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TENTH REPORT
OF THE SELECT COMMITTEE
ON THE OMBUDSMAN

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LEGISLATIVE ASSEMBLY
ASSEMBLÉE LÉGISLATIVE

April 1983

THE HONOURABLE JOHN M. TURNER
Speaker of the Legislative Assembly
of the Province of Ontario

Sir,

We, the undersigned members of the Committee appointed by the Legislative Assembly of the Province of Ontario on Thursday, July 2, 1981, have the honour to submit the attached tenth report.

ROBERT W. RUNCIMAN, M.P.P.
Chairman

ROBERT MACQUARRIE, Q.C., M.P.P.

ROBERT MITCHELL, M.P.P.

RENE PICHE, M.P.P.

YURI SHYMKO, M.P.P.

DON BOUDRIA, M.P.P.

RON VAN HORNE, M.P.P.

TONY LUPUSELLA, M.P.P.

MICKEY HENNESSY, M.P.P.

DAVID COOKE, M.P.P.

WILLIAM HODGSON, M.P.P.

JOHN EAKINS, M.P.P.

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ON THE

OMBUDSMAN

ROBERT W. RUNCIMAN, M.P.P.	Leeds
ROBERT MACQUARRIE, Q.C., M.P.P.	Carleton East
ROBERT MITCHELL, M.P.P.	Carleton
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YURI SHYMKO, M.P.P.	High Park Swansea
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JOHN P. BELL	Counsel to the Committee
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TENTH REPORT OF THE SELECT COMMITTEE ON THE OMBUDSMAN

Part I Introduction

The Committee met for three weeks in September, 1982 to consider the Ninth Report of the Ombudsman and deal with other matters relevant to its terms of reference. The Committee wishes to extend its appreciation to the representatives of all of the governmental organizations who appeared before it, for their co-operation and assistance. The Committee continues to be impressed generally by the level of presentations made on behalf of these organizations. The Committee's work has been made easier by the efforts of those involved.

The Committee also wishes to extend its appreciation to the Ombudsman and his staff for their very able advice and assistance. It was particularly assisted by the increased role played by the Ombudsman during these proceedings. His opinions and comments expressed in the areas of the organization and operation of his office were valuable.

The remainder of this Part is intended to set forth the Committee's opinions on two distinct matters. These opinions should not be construed as inconsistent. The fact that the Committee considers the Ombudman's operation to be of high quality does not prevent it from being critical of matters which do not best serve the people of Ontario or which may jeopardize his relationship with the Assembly.

The Committee has found again that the Ombudsman's investigations are thorough; his reports are well documented, well written and comprehensive; and his decisions as expressed in "Section 22 Reports" are objective and based upon material facts disclosed by the investigations. In other words, it is still of the opinion that the office is a "first class" operation. However, the Committee remains of the opinion that further steps can and must be taken to decrease the time in which jurisdictional complaints are processed by the office to appropriate conclusions. The Committee commends the Ombudsman for the significant steps which have been taken by him and his staff in the past two years to decrease the backlog of cases, the average duration of jurisdictional files and other matters and to otherwise make more efficient the operation of the office. Nevertheless, because the office does

rank among the very best in the world it is appropriate to expect that further improvement in performance will occur.

It is the experience of the Committee members and many of their colleagues in the Legislature that one's effectiveness in dealing with a problem or concern of a constituent, or complainant as the case may be, diminishes as the time taken with that problem increases. There is no formula which can be applied to determine when maximum effectiveness is obtained or lost. It of course depends on the circumstances of each case. However, where it takes in excess of one year to close over thirty percent (approximately 650) of the jurisdictional files, the overall effectiveness of the office has been diminished. The Committee will continue to pursue this matter with the Ombudsman and his staff until satisfied that all steps have been taken to maximize the effectiveness of the office.

The Committee is equally concerned that its effectiveness has been jeopardized by the delay between the tabling of its Ninth Report (December 1981) and its ultimate adoption (November 18, 1982). The only means whereby the Ombudsman can obtain the result recommended by him for a particular complainant is to have that recommendation approved by this Committee and ultimately adopted by the Legislature. If steps are not taken to significantly reduce the time within which the Legislature considers for adoption the recommendations for this Committee, then the Ombudsman and through him the complainants, will be faced with a delay of approximately two years between the time the Ombudsman initially makes his recommendation to the governmental organization concerned until the Legislature finally makes a decision whether in effect to adopt that recommendation.

In the Committee's opinion the Ombudsman process is not being served by such a delay. Accordingly, the Committee has recommended elsewhere in this Report that its Reports which contain recommendations for the adoption of recommendations of the Ombudsman be debated by the Legislature within eight sessional weeks of the date of the tabling of its reports.

During the Committee's proceedings in September an issue arose between it and the Ombudsman concerning its entitlement to certain documentation and information requested from the Ombudsman. On February 9, 1982, the Committee by motion requested that the Ombudsman provide it with a copy of his office's budgetary submission which was made to the Board of Internal Economy on December 14, 1981 with the names of specific employees deleted. This request was communicated to the Ombudsman in writing shortly after February 9th.

No formal response was received to the Committee's request until September 15, 1982 when the Ombudsman by letter to the Chairman of the Committee advised that he would not provide the Committee with the budgetary submissions and would not participate in any discussions by the Committee of those submissions.

The Ombudsman's letter, (Schedule 1) sets forth four reasons for his position:

(a) it was beyond the Committee's terms of reference to request such matters;

(b) it would not assist the Committee in carrying out its terms of reference;

(c) to provide the materials would be to flout the wishes of the Assembly which had to date declined to adopt previous Committee recommendations that its terms of reference be expanded to receive and consider the annual and supplementary estimates of the Ombudsman and;

(d) to provide the requested materials without an amendment to the Committee's order of reference would be to compromise the independence of the Ombudsman in his day to day operation of the office from interference by the political arm of the Legislature.

The Ombudsman stated that unless the Committee's order of reference were amended to include the authority to consider his estimates or an appropriate amendment made to the Ombudsman Act, he would not comply with the Committee's request.

The Committee attempted to resolve the apparent impass without formal confrontation or actions which might significantly harm the relationship between the Committee and the Ombudsman. These efforts did not produce any satisfactory result. In any event the issue was resolved when on November 18, 1982 the Legislature adopted the Ninth Report of the Select Committee and in particular recommendation number 7:

> "that its order of reference be amended to provide that it receive and consider all estimates and supplementary estimates of the Ombudsman and to report thereon to the Legislature with whatever recommendations are considered appropriate".

Shortly thereafter the Ombudsman tabled with the Chairman a copy of the requested materials. Because the Committee believes that the positions set forth in the Ombudsman's letter and his refusal to honour the Committee's request have serious implications on the role and relationship of his office to the Assembly, it feels that the following comments are appropriate.

The Committee neither agrees with nor accepts any of the reasons set forth by the Ombudsman in refusing to honour the Committee's request. In the Committee's opinion its request was well within its authority and should have immediately been honoured by the Ombudsman.

This is not the first occasion in which the Committee has disagreed with the Ombudsman over its authority to request information and to consider certain matters. In 1977 the former Ombudsman took the position that the Committee had no authority to deal with concerns addressed to it by Patrick Reid, M.P.P. respecting the appearance on a local television station by a member of Ombudsman's staff with a candidate nominated by another party who eventually ran against Mr.

Reid. The Ombudsman on that occasion walked out of the Committee's proceedings, although requested by it to remain. The Committee believes that the comments it made in its Second Report respecting the Ombudsman's conduct at that time are applicable on this occasion.

> "This was an ill-advised act displaying an unfortunate attitude and a misunderstanding of the role of this Committee and its obligation to report to the Assembly.
>
> In the opinion of the Committee there must be an ongoing relationship based on mutual respect and understanding between the Ombudsman and the Committee. In order to achieve this respect and understanding, the Committee chooses not to comment at length upon this incident or to make any recommendation about it. The Committee hopes it will not occur again.
>
> The Committee believes that the public is best served by the ongoing dialogue between the Ombudsman and the Assembly through this Committee, as envisaged by the Legislature when the Act was passed; by the Select Committee under the chairmanship of Vernon Singer, Q.C., M.P.P.; and by the Legislature when it appointed the Select Committee. The essence of the relationship between the Assembly and the Ombudsman does not lie in any legislative definition of jurisdiction, but in good faith, mutual respect, and co-operation, with open and free discussion between this Committee and the Ombudsman. The Committee urges this view on the Ombudsman." (Emphasis added)

On November 4, 1982 when the Committee's Ninth Report was debated in the House the Chairman stated as follows:

> "...I wish to put on the record some comments about the Ombudsman and his office. While there have been and doubtless will always be disagreements of this nature, I have no hesitation in saying that for my part I have the greatest respect for the integrity and dedication of our present Ombudsman, the Honourable Donald Morand, and for the calibre of his staff.
>
> To paraphrase the comments on page 8 of the Report, while the Committee will continue to comment critically on the Ombudsman's procedures and approaches, particularly those relating to the length of time taken by the Ombudsman to deal with complaints, it will do so in the recognition that the

> operation is already first class and in the belief that the Ontario Ombudsman's office can and should be the best anywhere."

The Committee endorses the Chairman's comments.

Having reached the mandatory retirement age, the present Ombudsman, the Honourable Donald R. Morand, will be retiring later this year. The Committee congratulates and commends him for the contribution he has made to the people of the Province of Ontario and in particular to the institution of the Ombudsman in this Province. He assumed the position at a time which may well have been the most critical in its development. During his tenure the quality of the investigations of the office increased substantially; the Reports issued from his office were well written and comprehensive; the extraordinary backlog of cases which existed four years ago was substantially diminished and the office developed a relative stability which was important for any effective performance. His manner and style won the respect of virtually all the governmental organizations with whom he dealt. The working relationships with some organizations, most notably the Workers' Compensation Board, has never been better.

His successor will inherit a high quality operation with the potential to meet almost immediately, the demands of the office and the needs of the people of the Province of Ontario throughout the 1980's. The people of Ontario require the Ombudsman to be <u>seen</u> to perform his functions and perform them well. The new Ombudsman should be a person with the ability to further develop the office as an effective instrument of the people to redress quickly and forcefully the consequence of maladministration by governmental organizations. The Committee hopes that these comments will provide guidance in the appointment of Mr. Morand's successor.

Part II - Comments and Response from the Ombudsman

(a) Response from the Ombudsman to the Committee's Ninth Report

Many of these responses are dealt with under specific subject matter elsewhere in this report e.g. statistical analysis, North Pickering. However, the two matters which caused the Committee most concern were the Ombudsman's comments vis-a-vis the limits of its authority to formulate general rules for the guidance of the Ombudsman in the exercise of his functions under the Ombudsman Act and the Ombudsman's response to the comments of the Committee on page 22 of its Ninth Report as to the trend of the increase in duration of "closed files" and the office's ability to cope with the existing work load.

As a response to the Committee's comments in the Ninth Report the Ombudsman forwarded a letter sent to the Chairman dated March 10, 1982 (see Schedule 2). The Committee was concerned as to the Ombudsman's reliance on this letter as a response since it appeared to be critical of certain conclusions and comments drawn by individual members and the press respecting the organization and operation of his office. However, the Ombudsman subsequently clarified his position. He was able to refer to only one place in the Committee's Ninth Report where he disagreed with its conclusions. That matter (role of administrative changes on increased durations to close files), was fully discussed with the Ombudsman and it was agreed that no further misunderstanding remains as to the Ombudsman's statistics and the Ombudsman's interpretation of the Committee's Report.

The Committee has no doubt that the question of the extent of its jurisdiction vis-a-vis general rules will continue to be discussed with this and succeeding Ombudsmen. Needless to say, the Committee does not share the Ombudsman's view that the authority is confined "to a specific category", and comments on this matter in Part VI of this report.

Since the Committee's Report was only formally adopted by the Legislature in December the Committee will shortly be giving the Ombudsman

further opportunity to make any other comment and response which he considers appropriate.

The Committee has already commented in Part I on the delay in the adoption of its Ninth Report.

FOR THE REASONS AS SET ON PAGES 1 AND 2 OF THIS REPORT THE COMMITTEE RECOMMENDS THAT ALL REPORTS TABLED BY IT IN THE LEGISLATURE WHICH CONTAIN RECOMMENDATIONS FOR THE ADOPTION OF OMBUDSMAN RECOMMENDATIONS BE DEBATED WITHIN EIGHT SESSIONAL WEEKS.

(b) Responses from Governmental Organizations to recommendations contained in the Report

(1) Ministry of Health

Recommendation No. 2 - Complaint No. 40, Third Report of the Ombudsman

See Part III, Subsection (e), Subsection (iv).

(2) Ministry of Labour - Workers' Compensations Board

Recommendations No. 5 and 6

The Committee in its Ninth Report stated as follows:

"While the Committee, earlier in this report, has indicated that it acknowledges the Legislature's right to reject any recommendation made by it supporting a recommendation of the Ombudsman, it is nevertheless concerned that there remains a very unsatisfactory situation as far as Section 42(1) (now 43(1)) of the Workmen's Compensation Board Act is concerned. It is clear that the section is capable of more than one legal interpretation. The Minister of Labour, the Workmen's Compensation Board and indeed the Legislature, prefer an interpretation which provides that the level of permanent disability award shall be determined solely from the clinical assessment made of the injury in question. The Ombudsman, himself a former Justice of the Supreme Court of Ontario, and his Select Committee have and continue to interpret the Section differently as permitting a consideration of all relevant factors in determining the quantum of the permanent disability award.

It is not unusual to have a difference in legal opinions respecting legislation providing for the payment of money benefits to persons in accordance with certain formulae. It is also not unusual to have a difference of legal interpretations of certain statutory provisions which have, for all practical purposes, been applied by the body administering the Act in a manner different from the strict legal interpretation.

In the Committee's opinion, while the Legislature may have been justified in rejecting the Committee's recommendation on the grounds of the two independent legal opinions obtained by the Board and the Minister of Labour, it has a further duty to assist in the resolution of the consequences of that decision. There is a procedure readily

available under the Constitutional Questions Act, R.S.O. 1980, Volume 1, Chapter 86, to obtain a final determination of which of the two interpretations is correct. Under that Act,

> "The Lieutenant Governor in Council may refer to the Court of Appeal or to a Judge of the Supreme Court for hearing and consideration any matter that he thinks fit, and the Court or Judge shall thereupon hear and consider the matter so referred." (Section 1).

On such a reference the Court could consider all of the legal opinions expressed to date, the conduct of the Workmen's Compensation Board as it has historically interpreted and implemented the section, and any other circumstances which may be relevant and necessary to interpret the section.

THE COMMITTEE THEREFORE RECOMMENDS THAT THE LIEUTENANT GOVERNOR IN COUNCIL REFER TO A JUDGE OF THE SUPREME COURT OF ONTARIO FOR HEARING AND CONSIDERATION THE INTERPRETATION OF SECTION 42(1) OF THE WORKMEN'S COMPENSATION BOARD ACT (NOW SECTION 43(1)).5

The Committee was referred to the provision in the White Paper released by the Ministry of Labour in response to Professor Weiler's report "Reshaping Workers' Compensation for Ontario" that under new Workmen's Compensation Board legislation,

> "Those workers who were injured previously but who elect to transfer to the new Act will have their benefits recalculated on the basis of <u>actual wage loss</u>." (emphasis added)

The Committee understands that such legislation will permit the 135 complainants represented by complaint No. 25 to apply to the Workmen's Compensation Board for a recalculation of their benefits more in accordance with the interpretation of Section 43(1) preferred by the Ombudsman and this Committee.

However, the White Paper is apparently silent on the issue of whether the recalculation and entitlement of benefits on the basis of actual wage loss will be retroactive to the date of the commencement of the permanent disability. THE COMMITTEE THEREFORE RECOMMENDS THAT THE MINISTRY OF LABOUR CONSIDER INCLUDING

> A PROVISION IN THE NEW WORKMEN'S COMPENSATION LEGISLATION TO PROVIDE FOR RETROACTIVE PAYMENT OF BENEFITS TO WORKERS SUCH AS THE 135 REPRESENTED BY THE OMBUDSMAN'S COMPLAINT NO. 25, ON THE BASIS OF ACTUAL WAGE LOSS.6."

In response to recommendation No. 5 the Deputy Attorney General advised the Ministry of Labour that since he concurred in the legal opinions that were obtained by the Board and the Ministry he did not see any need to refer the matter to the Court for consideration. He further stated that:

> "In my respectful view, the matter is not a legal problem but a political one which Cabinet must deal with either by supporting the legal opinion and the current practice of the Board and thereby refusing a reference under the Constitutional Questions Act, or, by considering a possible amendment to the Workmen's Compensation Act to broaden the criteria for the determination of the quantum of permanent disability awards."

The Deputy Minister of Labour concurs with the view expressed by the Deputy Attorney General. The Government does not intend to implement Recommendation No. 5. The Committee is disappointed that the Court will not be utilized to resolve the differing legal opinions which exist respecting this section of the Workmen's Compensation Act. The legal uncertainty created by the differing legal opinions will continue.

The substance of the amendment contemplated by the Committee's Recommendation No. 6 was considered by the Legislature's Standing Committee on Resources Development last year when it dealt with Professor Paul Weiler's Report "Reshaping Workers Compensation for Ontario". The Ministry of Labour and the Workmen's Compensation Board are both reluctant to respond to this recommendation in any detail until the report of the Resources Development Committee has been tabled and debated in the Legislature. Accordingly, the Committee defers any further comment until a later date.

Part III - Ninth Report of the Ombudsman, April 1, 1981 to March 31, 1982

(a) Statistical Analysis

Before any meaningful statistical analysis can be carried out of the matters handled by the Ombudsman's Office, a general explanation is required of the manner of which the work of the office is "processed" and recorded. Generally, the work is processed in two ways: (1) a file is opened because of the jurisdictional nature of the complaint or because of the time and effort involved to determine the jurisdictional issue and/or to obtain a resolution and; (2) no file is opened on information requests or complaints which are handled or resolved with minimal time and effort and on which documentation is minimal. The office describes these as "fast action" matters.

The statistics reported by the Ombudsman during the fiscal period in question are essentially broken down by the two categories above. When one compares statistics for previous fiscal periods it is important to ensure that the comparisons relate to identical categories. That is either (a) a comparison of files to files; (b) a comparison of fast action matters to fast action matters; or (c) a comparison of the combined totals of the two categories. It is with this in mind that the Committee makes the following comments and observations after analyzing and comparing these statistics for the fiscal period ending March 31, 1982 with the fiscal period ending March 31, 1981.

Matters Received by the Ombudsman's Office
during the Fiscal Period ending March 31, 1982

(a) The combined total of complaints, both "fast action" and file openings, increased by 10 percent (8,709 to 9,567);

(b) The number of complaint files which were opened decreased by over 10 percent (4,022 to 3,217);

(c) The number of "in progress" files open as at the end of the fiscal period decreased by over 10 percent. In fact the total (1,457) is reported as the lowest since the office began full operation in January, 1976.

The "in progress" statistic is perhaps the most significant in terms of the Committee's continuing concern as to the time taken to resolve complaints. There is no doubt that the Ombudsman has accomplished his goal of having more people working on fewer files than has ever been the case in the history of the office. If that is so then the Committee is entitled to expect that the statistics for the next reporting period (presuming the number of complaints received and the staff complement remain proportionally the same) will demonstrate that the number of in progress files and the average duration of those files in the office have decreased.

Matters Closed by the Ombudsman during
the Fiscal Period ending March 31, 1982

(a) The combined total of all matters closed decreased by just over 5 percent;

(b) The number of cases wherein the Ombudsman made recommendations to governmental organizations decreased by over 80 percent (168 to 28). This reduction may be attributed to the extraordinary number of matters which were closed during the previous fiscal period. However the Committee intends to pursue this matter to determine whether any significant trend is developing;

(c) The number of matters resolved by the office's involvement decreased by almost 40 percent. This again may be explained by the extraordinary performance in the previous fiscal period. This Committee intends to pursue this matter further;

(d) The ratio of complaints resolved in favour of a complainant to those resolved in favour of a governmental organization has remained approximately the same. It is due at least in part to a consistency of approach in the exercise of the Ombudsman's discretion.

Duration of Matters Handled by the Office

(a) In Progress Files (files not yet closed as at March 31, 1982 - 1,457)

Of the total in this category, 31.4 per cent were open for more than a year; 15.0 per cent were open for at least two years and 7.4 per cent were open for more than 33 months.

(b) All Matters Closed (files and fast action 10,175)

As of March 31, 1982, 7.7 per cent of the matters closed were outstanding for longer than one year; 2.6 per cent were outstanding for longer than two years and 1.1 per cent were outstanding for more than 33 months. The average duration of all matters was 79 days.

(c) Jurisdiction Complaints Closed by March 31, 1982 (cases where files were opened - 3,376)

Of this category 31.1 per cent were open for a period longer than one year, 10.3 per cent were open for a period longer than two years and 4.4 per cent were open for a period longer than 33 months. The average duration of these files was 202 days.

The Committee has already expressed its concern as to the duration of matters handled by the office particularly in the category of jursidictional complaints. On the one hand the Ombudsman should be complimented for closing in excess of 92 per cent of matters received by his office within the space of one year or 79 days on average. On the other hand, the jurisdictional matters, which require the exercise of Ombudsman functions in the most complete sense, on average require substantially more time to complete.

For example, the 28 matters wherein a recommendation pursuant to Section 22 of the Ombudsman Act was made to a governmental organization took an average of 664 days to complete. The Committee does not intend to make any further comment or recommendations at this time. It will however continue to pursue with the Ombudsman and his staff reasons for the various times taken to complete the various categories of matters.

The Committee notes with interest that the Ombudsman now has in place a tracking mechanism to pinpoint "problem files" to assist him in keeping these to a minimum. It further understands that the Ombudsman forecasts an extremely small number of files which would fall into the category of inordinate duration, that the backlog is virtually eliminated and that the statistics which cause the most concern will not again occur.

The Committee is anxious to review the statistics for the latest fiscal period against these recent administrative changes.

(b) Workers' Compensation Board

(i) Definition of "Accident"

The Ombudsman reported a disagreement with the Workers' Compensation Board respecting the definition of "accident" as found in Section 1(1)(a)(III) of the Workers' Compensation Act.

Although the Ombudsman intended to ask the Committee to accept his interpretation over the Board's and to make an appropriate recommendation to the Legislature, this was avoided by the following agreement reached between the Ombudsman and the Board:

> "In determining whether personal injury by accident arising out of and in the course of employment is caused to an employee under Section 1(1)(a)(III), the Board:
>
> (a) will not deny a claim solely because, either
>
> (i) the claimant or the Board is unable to identify a specific accident, incident or event which the claimant alleges caused the disablement, or
>
> (ii) the work that the claimant was engaged in was repetitive or performed for an extended period of time.
>
> (b) the Board will have regard for the medical opinion in the Board file including medical opinions that the Board sees fit to obtain."

The Committee commends both the Ombudsman for the approach he has taken and the Workers' Compensation Board for its readiness and willingness to agree to a formula designed to overcome an apparent impass.

Whenever the Ombudsman is of the opinion that the determination in his favour (by this Committee and the Legislature) of some matter of general administrative policy and practice will avoid a significant number of complaints made to his office, then he should refer and report those matters to the Committee. On those occasions the governmental organization with which the disagreement exists should be prepared to come to the Committee to explain why its policy or practice is to be preferred over that of the Ombudsman.

(ii) 135 Cases

In Recommendation 3 of its Ninth Report the Committee recommended to the Ombudsman that he conduct further investigations as required by the provisions of the Ombudsman Act and then formulate such opinions, recommendations and reports as he considers appropriate in the circumstances. In each of the 135 cases the Ombudsman was required to make a finding either in favour of the complainant or the Workers' Compensation Board.

The Ombudsman has not completed his investigation of all 135 cases. As of the writing of this report 133 cases were closed without finding in favour of the complainant. Of the 2 remaining the possibility exists that some will result in recommendations made to the Workers' Compensation Board.

The Committee urges the Ombudsman to complete the investigation of all of these matters as quickly as possible. ACCORDINGLY IT RECOMMENDS THAT THE REMAINING NINE CASES BE COMPLETED AS QUICKLY AS POSSIBLE AND THAT THE OMBUDSMAN REPORT TO THE LEGISLATURE ON THE DISPOSITION OF EACH.2

The Committee intends that if some of the 9 cases are categorized as "recommendation denied" it will take such steps as are appropriate to conduct hearings during its next sittings.

(c) North Pickering

The Ombudsman advised the Committee that since September, 1981, the "Hoilet Report" has been finalized and all persons who may have been adversely affected by that report have been given an opportunity and in fact have made responses to it. It seems that the Ombudsman's discussions with the Ministry of Housing has reached a critical stage insofar as the satisfactory resolution of outstanding matters is concerned.

The Committee does not wish to do anything which might have a negative effect on the Ombudsman's efforts in this regard. At the same, it continues to be concerned over the inordinate period that has elapsed since the North Pickering matter first came to the attention of the Legislature. The Committee hopes the Ombudsman will be mindful of these comments in his forthcoming efforts.

THE COMMITTEE RECOMMENDS THAT IN THE EVENT THAT THE OMBUDSMAN IS ABLE TO REACH A SATISFACTORY RESOLUTION OF ALL OUTSTANDING NORTH PICKERING MATTERS, OR IF HE CONCLUDES THAT THE RESPONSES OF THE MINISTER TO ANY OF HIS RECOMMENDATIONS ARE NEITHER ADEQUATE OR APPROPRIATE, THEN HE SHOULD REPORT TO THE LEGISLATURE ON THE THE NORTH PICKERING MATTERS BEFORE THE END OF JUNE, 1983.3

(d) Amendments to the Ombudsman Act

Recommendation 8 of the Committee's Ninth Report urged that any legislation tabled amending or otherwise dealing with the Ombudsman Act be referred to the Committee for consideration after second reading. To date no such bill has been tabled in the Legislature.

However the Ombudsman, with the concurrence of the Attorney General, did table with the Committee a copy of a draft Bill and policy submission given to Cabinet in January, 1981. (see Schedule 3).

The Committee has not been given any indication from the Ministry of the Attorney General as to when, if ever, a Bill amending the Ombudsman Act will be tabled. The Act requires obvious amendment in many areas both by way of "house keeping" and substantive changes. To withhold legislation amending the Act which would improve the ability of the Ombudsman to perform his functions deprives the people of the Province of Ontario of a more effective Ombudsman.

ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE ATTORNEY GENERAL TABLE, DURING THE 32ND PARLIAMENT OF THIS LEGISLATURE A BILL AMENDING OR OTHERWISE DEALING WITH THE OMBUDSMAN ACT HAVING REGARD FOR THE MATTERS CONTAINED IN THE DRAFT BILL AND POLICY SUBMISSION PROVIDED BY THE OMBUDSMAN IN JANUARY, 1981.4

(e) Recommendations in Previous Ombudsman Reports and/or Committee Reports in respect of which it is expected that some further action will be taken by the Governmental Organization affected

Ministry of Education

The Ministry of Education has not yet implemented Recommendation No. 23 of the Committee's Third Report

> "that the Ministry forthwith pursue its discussions with the insurance industry and other interested parties for the purpose of developing an appropriate contract of insurance in the indemnity type at a realistic premium which would adequately compensate a pupil for injuries sustained in the case of a peer accident as a result of participation in shop classes and in organized athletic activities."

The Ministry has reported that the Committee's recommendation has been implemented in part by virtue of a recent amendment to the Education Act (Bill 46). Section 8(1)(i) now permits the Minister to

> "prescribe the conditions under which and the terms upon which pupils of Boards shall be deemed to be employees for the purposes of coverage under the Workers' Compensation Act, deem pupils to be employees for such purpose and require a board to reimburse Ontario for payments made by Ontario under that Act in respect of a pupil of the board deemed to be an employee of Ontario by the Minister."

Thus pupils who participate in "work experience" programs in the industrial and commercial communities will be covered by the Workers' Compensation Act in the event an accident arises out of or occurs during the course of "employment".

Insofar as the remaining pupils who are covered by the Committee's recommendation are concerned, the Ministry has yet to act. There has been some consideration of the viability of implementing a province wide mandatory form of student's insurance providing comprehensive coverage for all students in all school related situations including school sponsored or related transportation and co-operative work place situations. The preliminary estimate of the cost of such an insurance plan is four million dollars. The Ministry is unable to indicate what the probable outcome of its deliberations will be or whether in fact such an insurance scheme will ever be implemented. The Ministry was frank to concede that the major obstacle was cost. There is little doubt that such coverage is possible providing the funding was available.

The Committee remains of the opinion that its recommendation can and should be implemented. The Ministry is to be commended for providing by the recent amendment to Section 8 of the Education Act that pupils on work experience programs will have some form of "coverage". However, further steps must be taken to ensure that pupils participating in programs at school in the kind mentioned in the recommendation which carry a similar risk of injury to those working in the "experience" programs have available insurance coverage in the event of a "pure accident".

In the Committee's opinion this can be accomplished in one of two ways: (a) by the Minister deeming, for the purposes of Section 8(1)(i) of the Education Act, all pupils who participate in shop classes and organized athletic activities as

employees of Ontario or (b) by the implementation of a policy of insurance on a province wide basis funded ultimately by the people of the Province of Ontario. The Committee will pursue these suggestions with the Ministry during its next sittings.

Ministry of Government Services

There are two recommendations of the Select Committee which have yet to be implemented by this Ministry. The first is Recommendation No. 34 in the Committee's Third Report:

> "that the Audit Act and the Financial Administration Act be amended to provide that when such a recommendation is made by the Ombudsman after all necessary and appropriate requirements of the Ombudsman Act have been adhered to by his office, and when entirely accepted by the governmental organization, "a lawful authority" is created for such money to be paid by the governmental organization out of the consolidated revenue fund. Further that the Ombudsman's office and the Ministry of Government Services resume their discussions on the merits of the Ombudsman's recommendation that the results of these discussions are to be reported to the Select Committee."

The Ministry of Government Services is willing to comply with a recommendation made by the Ombudsman that certain monies be paid to this complainant. However, the Ministry feels that unless the Financial Administration Act is amended the Ministry cannot implement the Ombudsman's recommendation.

The Committee has had preliminary discussions with representatives of the Treasurer on an appropriate amendment to the Financial Administration Act. Initial indications are that the Ministry is not opposed in principal to such an amendment. However, the Ministry requires a further period to consider the full implications before making a formal response to the Committee's recommendation. The Committee intends to pursue this matter further with representatives of the Treasurer and will report further on all developments.

Recommendation No. 24 of the Committee's Third Report proposed that the Ministry table appropriate legislation removing the present restriction on the

total current earning of a Provincial superannuitant. The Management Board of Cabinet has approved in principal an amendment to the Public Service Superannuation Act which would remove the present provisions requiring reduction or suspension of pension benefits where a pensioner is re-employed by the Crown. The proposed amendment would apply to persons who have passed their 65th birthday and would be retroactive to October 1, 1976. Although a number of amendments to the Act have been proposed there is no current forecast as to when it will be tabled in the Legislature.

The Committee has some concern that the proposed amendment applies only to persons who have reached compulsory retirement age (65). Neither the original Ombudsman's recommendation nor Recommendation No. 24 of the Committee's Third Report addressed the question of limiting the application of the amendment to that category of persons. The Committee is mindful that the proposed amendment will only apply if persons are re-employed by some department or ministry of the Crown. Superannuitants of whatever age may obtain employment in the private or other government sectors and not be subject to a reduction of pension benefits.

It may be that for all practical purposes the number of persons caught by the present legislation who are under 65 are relatively few. Accordingly, the Committee does not intend to pursue this matter further beyond ensuring that the proposed amendment is in fact passed. When that occurs the Committee will consider its recommendation to have been implemented.

Ministry of Health

Three recommendations made by either the Ombudsman or the Committee have yet to be satisfactorily implemented.

Recommendation No. 1 of the Ninth Report of the Select Committee

> "that all decisions made by O.H.I.P. in respect of any claim made for benefits pursuant to Code R990 (now R991) be subject to the appeal procedure set out in the General Manager's Directive dated May 21, 1981 and the

Memorandum of the Director of the Professional Services Branch dated August 13, 1981."

It has been the position of the Ministry and O.H.I.P. that where a claim for benefits is denied on the grounds that the procedure is available in Ontario there is no appeal available of that decision.

There was no dispute by the Ministry that where the medical or hospital procedure performed out of the jurisdiction is not available in Ontario then an appeal is available from the General Manager's decision either to reduce the amount claimed or deny it in full. However, the real problem arises where the procedure in question is, in the opinion of the General Manager, available in Ontario and the claim is reduced from the amount charged to the amount stipulated in the O.H.I.P. fee schedule. In that case the General Manager believes that he has no discretion as to entitlement or amount; he is bound by the fees stipulated in the schedule. In those cases O.H.I.P. does not inform the persons of any right of appeal.

In the Committee's opinion, decisions made in respect of claims for benefits for services rendered outside of Ontario - whether or not it is determined ultimately that the services were available within Ontario - are "R991 decisions". In other words, a person should not be deprived of the right to be advised of the right to appeal simply because the General Manager or his designate is of the opinion that the service is available in Ontario.

The Ministry has confirmed to the Committee that an O.H.I.P. decision to reduce a claim because of a determination that the service is available in Ontario can be appealed. It seems however that by some "technical" interpretation of the Committee's recommendation those persons have not been notified at the time of the decision of their right to appeal. The Committee expects hereafter that O.H.I.P. will comply with all aspects of the Committee's recommendation so that all persons who have submitted claims to O.H.I.P. for payment for services rendered outside of Ontario are advised of their right of appeal when they are notified of the decision.

Ombudsman's Report No. 3 - Detailed Summary No. 40

In that summary the Ombudsman recommended inter alia:

> "that the Nursing Homes Act 1972, be amended in order that provisions be made for the successful candidate for the construction of a new home to make application for a conditional licence immediately upon the making of the award to him. This licence should be conditional on compliance with the terms of the proposal and any subsequent stipulations imposed by the Ministry prior to the granting of an unconditional licence."

To date the necessary amendments have yet to be enacted although the Ministry has agreed to comply with the recommendation.

The Committee was advised by the Ministry that while it still intended to incorporate the amendment into the Nursing Homes Act no projection could be made as to when that would occur. Six years from the date of the initial Ombudsman's recommendation is an inordinately long period of time for a Ministry to comply particularly when compliance comes under the heading of "house cleaning amendments." The Committee expects that the Ministry will table during the next session of the Legislature an amendment that will once and for all comply with the recommendation.

Committee Report Five - Recommendation No. 27;
Committee Report Six, Recommendation No. 1

Recommendation No. 1 in the Committee's Sixth Report stated:

> "that the Ministry of Health consider what changes should be made to the Public Hospitals Act and Section 47 in particular, including changes in the quorum provisions and length of membership respecting the Hospital Appeal Board. Further, the Ministry of Health cause an enquiry to be made in the provisions of the Public Hospitals Act to indentify and correct any act flowing from Sections 44 to 50 of the Act which may be improperly discriminatory."

As a result of that recommendation the Minister commissioned an enquiry by the Ontario Council of Health. The Council's Report was received and considered by the Ministry and subsequently meetings were held with representatives of both the Ontario Medical Association and the Ontario Hospital Association.

In its Eighth Report the Committee reminded the Minister of Health "that to the extent that the Council of Health identifies appropriate legislative change and so recommends to the Minister, the Committee will review those legislative changes as necessary to full comply with the recommendations in its Sixth Report".

The Council of Health's Report recommended an amendment to Regulation 865 of the Public Hospitals Act that hospitals be required to establish criteria for the appointment or reappointment of persons to the staff of public hospitals. The Committee was advised that the Ministry has drafted an amendment to the Regulation and it is expected that it will be enacted shortly. In the Committee's opinion if the amendment in substance provides that hospitals are required to pass by-laws providing that their Medical Advisory Committees make recommendations to the Hospital Appeal Board concerning every application for appointment or re-appointment to the hospital medical staff based on established criteria, then it would appear to comply with the recommendation contained in the Ontario Council of Health's Report.

The Committee and the Ombudsman share a concern that the Ministry has not to date invited submissions from the public on the issues raised by the Council of Health in its report. The Committee expects that before amending legislation is finalized, the public will be given an opportunity to make representations to the Ministry on the relevant issues.

Ministry of Housing

The Committee in Recommendation No. 3 of its Eighth Reported stated

> "that the Ontario Housing Corporation immediately conduct a review and study of its manuals and the decision making functions of housing authorities in particular for the purpose of amending its manuals to give housing authorities more guidance in order that the rules of administrative fairness will be more strictly adhered to".

The Corporation is continuing to revise its manuals and accordingly the Committee has not fully reviewed and considered whether there has been full compliance with the Recommendation.

However, it has considered the new appeals policy enacted by the Corporation which will allow applicants and tenants of public housing to seek a "review of decisions made by local housing authority". The Ministry has acted positively in respect of the recommendation. However the Committee has some concerns respecting the policy. First, the same tribunal will sit in "appeal" of its own decision. Secondly, there is an absence of guidelines or principles set out in the new policy to assist the tribunals with the criteria to be followed in determining whether or not the original decision should be altered.

The Committee accepts the Ministry's comment that this process is new and will continue to evolve. However further changes are necessary immediately to reduce many of the difficulties which are inherent in a process whereby a decision making body is set up as its own "Court of Appeal". If that process is to remain then at the least specific guidelines and criteria are required to assist in the "appeal process". The process must not only be fair but must be seen to be fair to those "appealing".

The Committee intends to pursue this matter further with the Ministry during its summer sittings.

Workers' Compensation Board

In its Seventh Report the Committee recommended, with respect to the Ombudsman's recommendation contained in Summary No. 38 of his Sixth Report, that the Workers' Compensation Board reconsider, by hearing, its decision of

December 15, 1971. In that hearing the Board was required to at least hear fresh evidence respecting the relationship between the complainant's symptoms and the compensable accident both from the medical referee appointed in 1971 and the psychiatrist retained by the Ombudsman during the course of his investigation.

On October 24, 1979 the Board directed that all relevant evidence including the Ombudsman's Report and the recommendation of the Select Committee be referred to a medical referee for a further opinion and report. The Board, after receiving the medical referee's report determined that the policy of benefit of the doubt was not appropriate and thereby denied the complainant entitlement.

The Committee in its Eighth Report after considering the Board's decision on reconsideration noted that it had:

> "grave reservations that the Appeal Board Panel in this matter considered the application of the policy of the benefit of the doubt as intended by the Committee and as articulated by the corporate Board policy itself. It is apparent to the Committee on the face of the Board's decision that the Appeal Board Panel took extraordinary steps to avoid applying the policy of the benefit of the doubt. It made findings of credibility against the complainant and his wife and resorted to the Canadian Medical Directory (25th Annual Edition) to assist it in assessing which psychiatric opinion it preferred.
>
> The Appeal Board Panel may have inadvertently cast itself in the role of an adversary vis-a-vis the complainant and his wife and vis-a-vis the psychiatrist in question. After those issues are fully discussed and explained to the Committee it will report to the Legislature with any appropriate recommendations.
>
> One might take from the Appeal Board's comments on pages 4 and 5 of its decision that the applicability of the policy of benefit of the doubt was determined by the contents of the two psychiatrists' expertise, qualifications and experience as recorded by the Canadian Medical Directory. If that be so then the Committee is concerned that the Appeal Board Panel may have acted beyond the scope of and intent of the policy and the Act itself."

Subsequently the Committee received written submissions from both the Board and the Ombudsman respecting its comments. The Ombudsman submits that the psychiatrist retained by the Board and the psychiatrist retained by his office are in agreement concerning the diagnosis of post traumatic neurosis and that the compensable accident was some factor in the development of the neurosis. The area of disagreement is the significance of the accident and whether it is sufficient to warrant an award of benefits in this case. Finally, the Ombudsman submits that when the cumulative medical evidence relied upon by the Board (on the cause of the post-traumatic neurotic condition) is weighed against the cumulative evidence of the complainant's family doctor and the Ombudsman's psychiatrist on the same issue, the evidence is "approximately equal in weight." In those circumstances the Board should apply the policy of benefit of the doubt to this case and award the complainant the appropriate benefits.

The Board on the other hand continues to prefer the evidence of its medical specialists and the medical referee as more definitive, conclusive and generally made closer in time to the date of the accident. The Board further dismisses the evidence of the family physician as lacking in objectivity by reason of his close association with the complainant. The Board questions whether the family physician has sufficient qualifications to render an opinion on the complainant's tendency to over-reaction and hypochondriasis.

The Committee notes that the submission of the Workers' Compensation Board was from the Appeal Board panel which rendered the decision which has caused this Committee concern. By its submission the panel continues to adopt an adversarial role vis-a-vis the complainant and his attending physicians (family doctor and psychiatrist). The Committee finds that role to be inappropriate. The Board is required by statute to adjudicate on issues, not represent the evidence of one side of an appeal.

In the Committee's opinion the panel has not given adequate consideration to the evidence of the complainant's attending physicians, including the psychiatrist retained by the Ombudsman, in assessing whether the policy of the benefit of the doubt is applicable. It has made assessments of the qualification and abilities of certain physicians without ever having considered any medical evidence

first hand. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE WORKERS' COMPENSATION BOARD RECONVENE A HEARING ON THIS MATTER AND CONSIDER THE EVIDENCE OF THE COMPLAINANT'S FAMILY PHYSICIAN AND THE PSYCHIATRIST RETAINED BY THE OMBUDSMAN FIRST HAND AND THEREAFTER DECIDE WHETHER THE POLICY OF BENEFIT OF THE DOUBT SHOULD BE APPLIED.5

In its Third Report, Recommendation No. 31, the Committee directed the Workers' Compensation Board to amend the Workers' Compensation Act to provide for statutory authority to recover or write-off over payments. That amendment has yet to be enacted. The Committee continues to be assurred by members of the Board that it is committed to such an amendment and it will be included in any legislation tabled in the Legislature when the Act is next amended. The Committee urges the Board and the Ministry of Labour to move as quickly as possible in this regard.

Part IV - Recommendations Denied

(i) Ministry of Consumer and Commercial Relations - Liquor Control Board of Ontario

Complaint No. 4

This involves a complaint against the Liquor Control Board of Ontario. The complainant, an operator of a small confectionary store located in a municipal airport in Northern Ontario, has since October, 1977 unsuccessfully attempted to obtain permission from the Liquor Control Board of Ontario to establish an agency for the sale of liquor in his store. The main purpose of the application is to provide a convenient facility for the purchase of liquor by U.S. tourists who use the airport in relatively large numbers, during hours and under such conditions as to preclude them from making purchases at the nearest L.C.B.O. outlet, some six miles away.

The Board has refused the complainant's application on the grounds that:

(a) The proposed outlet would be closer than 25 miles from the nearest L.C.B.O. outlet, and would thus not comply with the Board's written policy;

(b) The Board has not determined that there is a need for such an outlet which would be operated within 6 miles of the nearest L.C.B.O. outlet and;

(c) That any facilities at airports in the Province of Ontario shall only operate as "duty free outlets" pursuant to the relevant legislation.

The Ombudsman, as a result of his investigation, determined, inter alia, that there was significant support for the application from certain members of the Assembly and from other public and private officials in the area; that the Board had on other occasions made exception to its "25 mile" policy by permitting agencies to operate within a 25 mile radius of the nearest L.C.B.O. outlet; and that the Board's additional concern for the potential adverse effects on the native people by the

establishment of such an outlet was unfounded. He accordingly concluded that a considerable number of American tourists who land and make connecting flights at the airport are prevented from making purchases of Canadian liquor and in the circumstances of this case are in fact "remote" from a conventional liquor outlet. He determined pursuant to Section 22(1) of the Ombudsman Act that the Board's denial of a liquor agency authorization to the complainant was unreasonable. He therefore recommended pursuant to Section 22(3)(c) of the Act:

> "that the Board allow (the complainant) to sell liquor at his store under the authority of an agency licence to bona fide tourists and that such outlet ought to be operated during appropriate hours in which the liquor store located nearby is closed."

The Board referred the Ombudsman's recommendation to the Cabinet for consideration. Cabinet subsequently decided to uphold the Board's decision not to permit the establishment of the outlet. The Board subsequently informed the Ombudsman that it would not implement his recommendation.

The Committee is not fully aware of the reasons why the matter was referred to Cabinet. In any event Cabinet's involvement does not bind or affect the Committee in its consideration of this matter.

The Committee is unable to support the recommendation of the Ombudsman in this case. As of this date there is no liquor outlet of this type that is operated in any municipal airport in Ontario. There is no liquor outlet of any type which is permitted by the Board to operate during the hours of 10:00 p.m. to 10:00 a.m., the hours when the conventional outlets are closed. While the Board has conducted a couple of "pilot projects" respecting extended hours of outlets, nothing conclusive has been developed thereby. The apparent benefit which the Ombudsman believes would accrue to American tourists who pass through this airport and the consequent additional business available to the complainant, are not sufficient grounds to establish the precedent that this recommendation contemplates without more extensive information on the benefits which would accrue to the local community and the public generally.

The Board has advised the Committee that it sees no current need for an outlet at the airport in question. This position has been taken without any actual study or analysis of the matter with particular reference to the findings in the Ombudsman's Report. That is, no real assessment has been made to assess whether the needs of the local community in question and the public generally would be served by the establishment of such a liquor agency at the airport in question.

In the Committee's opinion it is incumbent upon the Board, before refusing an application of this nature, to make thorough investigation and analysis of the need and benefit to the local community and the public in general. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE LIQUOR CONTROL BOARD OF ONTARIO UNDERTAKE SUCH A STUDY AND REVIEW AND REPORT TO IT AS SOON AS POSSIBLE ON THE NEED FOR SUCH AN OUTLET. IN UNDERTAKING THIS INVESTIGATION THE BOARD SHOULD HAVE REGARD FOR THE CRITERIA DISCUSSED WITH THE COMMITTEE ON SEPTEMBER 8, 1982.[6]

(ii) Ministry of Health

Complaint Summaries No. 9 and 10

These two cases were considered together by the Committee since the issues are identical. That is whether O.H.I.P. should provide coverage for service performed by a dentist in a hospital setting when the procedure can, with appropriate legal authority, be performed by either a physician or a dentist in that setting.

In these two cases, surgical and related procedures were performed by oral surgeons, duly qualified and certified in the hospital setting, upon the referral of a duly qualified medical practitioner. The procedures in question can and are frequently performed in the same setting by either an oral surgeon (dentist) or a qualified medical practitioner specialized in surgery (frequently a plastic surgeon). However, at the time the O.H.I.P. fee schedule did not provide coverge when such procedures were performed by a dentist. The applications for payment of the dentists' procedures were denied.

The former General Manager indicated that he did not have any discretion under the Act to make payment in such cases. He did acknowledge that if the procedures had been performed by physicians coverage under the Plan would have been granted.

The Ombudsman, after completing his investigations, concluded in both cases that the Ministry's decisions not to pay the appropriate parts of the medical services was,

> "In accordance with a rule of law or provision of any act...that is or may be unreasonable...or improperly discriminatory".

In both cases he found that the surgery was necessitated by earlier surgery and the work performed was "unusual dental surgical procedure". Both claims would have been paid in part if the surgery had been performed by a plastic surgeon or other duly qualified medical practitioner. He further found in both cases that the complainants were not aware at the time of surgery that O.H.I.P. would not pay for the procedures if they were performed by a dentist.

Accordingly, he recommended in both cases:

> "that the Ministry of Health pay that portion of (the complainants') claim(s) which would have been an insured benefit had the operation(s) been performed by a plastic surgeon."

He further recommended:

> "that Section 43 of Regulation 323/72 of the Health Insurance Act, 1972 be amended to permit the General Manager to determine the amount of payment for exceptional cases where medical procedures are performed by persons in possession of the necessary hospital privileges who are not physicians."

(In the context of this complaint such persons are assumed by the Committee to be dentists with appropriate qualifications and with the required hospital privileges).

The Ministry declined to accept the recommendations in both cases, essentially on the grounds that its policy decisions to exclude certain dental services from coverage under the Act were sound, based on considered judgment, after consultation with the professions, as to what combination of services and benefits will constitute the most beneficial program for the public within the very limited purposes and resources of the program.

The Ministry is also of the view that officials administering the Plan should not have discretionary authority to provide coverage in exceptional circumstances. It is believed that the introduction of such discretion could very well be arbitrary, unfair or discriminatory and produce financial implications which would be totally unacceptable to the Government.

Lastly, the Ministry noted that in neither case was the patient informed by the referring physician or the oral surgeon that the services provided would not be covered. (The Committee also notes that since the July, 1982 amendments to the O.H.I.P. schedule of benefits for procedures of dentists, some of the services in question are now covered.)

Ministry representatives stated that the Government's involvement in the dental field has been limited as a matter of policy. However, the Government pays the hospital expenses for anesthestists' services, use of operating theatres etc. when a service is performed by an oral surgeon. In other words all relevant costs associated with the procedures performed in the hospital by an oral surgeon are covered except the oral surgeon's service.

The Committee supports the recommendations of the Ombudsman in these two cases. The critical issue is not what qualified profession performs the procedures in a hospital setting but whether those procedures should be included in O.H.I.P.'s schedule of benefits. Since they are covered if performed by a physician, the Ministry has obviously decided that they should be included. There is no

acceptable reason for denying payment for services rendered by an oral surgeon (dentist) in a hospital setting while paying for the identical services if performed by a medical practitioner. In the Committee's opinion such coverage can be made available for such dental services performed in a hospital setting without jeopardizing the Government's policy of providing coverage for a limited range of dental services.

As to the question of the Government's concern that the General Manager of O.H.I.P. be given discretion to determine coverage in appropriate circumstances, the Committee finds that to give him the discretion as contemplated by the Ombudsman's recommendations would not significantly expand the scope of his authority particularly since he would be acting pursuant to guidelines including "exceptional cases" and hospitalization as "necessary". Unlike some representatives of the Ministry of Health, the Committee has every confidence that the General Manager would not exercise that discretion in an arbitrary, unfair or discriminatory manner. Even if he were to do so the law provides adequate protection to those affected.

ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF HEALTH PAY THAT PORTION OF THE CLAIMS OF COMPLAINANTS CONTAINED IN CASE SUMMARIES 9 AND 10 WHICH WOULD HAVE BEEN AN INSURED BENEFIT HAD THE OPERATION BEEN PERFORMED BY AN PHYSICIAN. THE COMMITTEE FURTHER RECOMMENDS THAT SECTION 43 OF REGULATION 323/72 OF THE HEALTH INSURANCE ACT, 1972 BE AMENDED TO PERMIT THE GENERAL MANAGER TO DETERMINE THE AMOUNT OF PAYMENT FOR EXCEPTIONAL CASES WHERE MEDICAL PROCEDURES ARE PERFORMED BY PERSONS IN POSSESSION OF THE NECESSARY HOSPITAL PRIVILEGES WHO ARE NOT PHYSICIANS. THE COMMITTEE INTENDS THAT THESE RECOMMENDATIONS APPLY ONLY TO MEMBERS OF THE ROYAL COLLEGE OF DENTAL SURGEONS WHO HAVE OBTAINED THE NECESSARY HOSPITAL PRIVILEGES.7

Detailed Summary No. 11

The complaint in this case deals with a decision of the Ontario Board of Directors of Chiropractic which refused to permit the complainant to write the Ontario Chiropractic Licensing Examination. The Board refused because the complainant attended a college in the United States which operates under a semester system which permitted him to complete the required course in less than four calendar years. The Board has consistently required that persons seeking to write the examinations have completed courses in chiropractic which include not less than four academic years of not less than nine months each. That is, the Board stipulates that a required course of study be spread over four calendar years with vacations taken between each of the years. Because the complainant did not take vacations between each "year" of study he was prevented from taking the licencing examination.

The Ombudsman, after completing his investigation, determined pursuant to Section 22(1)(b) of the Ombudsman Act that it was unreasonable of the Board to interpret Section 25(2) of the Drugless Practitioners Act to require that four academic sessions of nine months be separated by three month vacations. He accordingly recommended pursuant to Section 23(3)(c) and (d) of the Ombudsman Act:

> "that the Board alter its practice of interpreting the Regulation in this matter and acknowledge that (the complainant) has satisfied the requirements of the Regulation and is therefore eligible to write the Ontario Chiropractic Licencing Examination."

The Board declined to implement the Ombudsman's recommendation essentially on the grounds that:

1. The Board has consistently interpreted the regulations to mean four academic sessions of nine months in each of four calendar years;

2. Its interpretation of the regulation has traditionally served Ontario well and is in line with other health disciplines; and
3. Its interpretation of the regulation gives the Board an ability to control the quality of its chiropractors.

The Committee supports the recommendation of the Ombudsman in this case. The Board has taken a narrow technical approach to its interpretation of the regulation.

Section 25(2) of Regulation 228 provides that

> "The course in Chiropractics shall include not less than four academic years of nine months each with at least 4,200 hours of instruction in the following subjects."

The purpose of the regulation is to ensure that applicants obtain a minimum standard and quantity of instruction not that they take Summer vacations between each academic year. The operative phrase in the regulation is "academic years of nine months". It is irrelevant if those years are strung together without any break. The anomaly in this case is that the complainant has, in terms of hours of instruction, exceeded the minimum required by the regulation in a shorter period of time. The Committee is mindful of the assurance by members of the Board of Chiropractic that quality of instruction is not an issue in this case.

ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE BOARD OF CHIROPRACTIC OF ONTARIO ALTER ITS PRACTICE OF INTERPRETING SECTION 25(2) OF REGULATION 228 BY REQUIRING APPLICANTS FOR THE ONTARIO CHIROPRACTIC LICENSING EXAMINATION TO HAVE TAKEN A COURSE OF STUDY CONTAINING FOUR ACADEMIC SESSIONS OF NINE MONTHS SEPARATED BY THREE MONTH VACATIONS. THE COMMITTEE FURTHER RECOMMENDS THAT THE BOARD OF CHIROPRACTIC OF ONTARIO ACKNOWLEDGE THAT THE COMPLAINANT HAS SATISFIED THE REQUIREMENTS OF THE REGULATION IN THIS REGARD AND IS THEREFORE ELIGIBLE TO WRITE THE ONTARIO CHIROPRACTIC LICENSING EXAMINATION.[8]

Workers' Compensation Board

Complaint No. 19

This complaint concerns a decision of the Appeal Board panel dated March 12, 1979 denying a claim for an increased attendance allowance. The complainant contends that the attendance allowance granted does not adequately reflect his degree of helplessness, caused by industrial accident.

The Ombudsman's investigation revealed that in June, 1974 the complainant fell from a scaffold receiving a right sided basil skull fracture. He was hospitalized and required significant neurosurgery. As a result of the injuries the complainant was considered to be totally disabled and unemployable due to visual impairment, deficiencies of mental function, dizziness, residual left side partial paralysis and post injury personality changes. In January, 1976 he was given a two year provisional permanent disability award by the Board.

In February, 1976 the Board granted the complainant an attendance allowance of $60.00 based on a "Group 1" categorization. This was changed to Group 2 in June 1977 and the attendance allowance was accordingly increased.

Attendance allowances are granted by the Board pursuant to Section 51(1)(c) of The Workers' Compensation Act. To assist in determining the extent of an allowance to be granted the Board has established 7 categories or groupings. The groupings in terms of the degree of assistance required, run from Group 1 (minimal actual service) to Group 7 (complete nursing and other related care on a 24 hour basis). The lowest attendance allowance is given for persons within the first group. It increases with each successive group classification. Head injuries are covered by Groups 1, 2, 3 and 6. All require some degree of supervision or attendance by third parties.

The Ombudsman found that the complainant requires supervision and assistance in daily living, and that the actual cost of that supervision and assistance probably exceeds the amount of the attendance allowance which he has been

awarded. He further found that the Board does insist on matching an injured worker to its established groupings rather than determining the actual reasonable costs of providing services needed in each case. Here because it determined that the complainant was in "Group 2", the Board fixed the allowance at the Group 2 level of compensation. He therefore concluded pursuant to Section 22(1)(b) of the Ombudsman Act that the Appeal Board's decision of March 12, 1979 was unreasonable

> "due to the fact that it was based on a policy concerning attendance allowances which is itself, in part, unreasonable in that it is too restrictive."

He also concluded that it was unreasonable for the Appeal Board panel to have concluded that the evidence presented on appeal was not sufficient to persuade it to depart from its policy allowance guidelines in this case.

Accordingly, the Ombudsman recommended pursuant to Section 22(3)(d) of the Act that the Board

> "alter its policy concerning attendance allowances to take into consideration the reasonable costs of providing supervision for those injured workers who, as a result of accident, require someone to be in attendance at all times in order to provide that supervision."

He further recommended that pursuant to Section 22(3)(g) of the Act that the Appeal Board

> "revoke its decision of March 12, 1979 and award (the complainant) an attendance allowance sufficient to cover the reasonable costs of providing the supervision and assistance which his condition necessitates."

The Board declined to implement the Ombudsman's recommendation. It disagreed with the Ombudsman's conclusion as to the nature and extent of supervision required for the complainant. The Board continued to rely upon the assessments made from time to time of the complainant by its staff which it said supported a Group 2 placement with the need for minimal actual service.

However, the Board did not address the question of the inadequacy of the specific attendance allowance awarded against the actual cost necessary to provide the required services. The Ombudsman contends that the Board's policy of assigning fixed amounts to Groups is too restrictive and fails to assess the individual needs of the injured worker. This complainant has been given a fixed amount as an attendance allowance by the Board not because of his individual needs but because the Board has assigned him to the Group 2 category.

The Committee notes that the Board is of the opinion that each case of attendance allowance need is considered on its individual merits and that a determination is in fact made of the reasonable costs for providing attendance services. The Board considers itself bound only by the Workers' Compensation Act and not by any policy or guideline which it develops from time to time for the purpose of administering the Act. The Committee assumes that this means that there are circumstances wherein the Board would grant an attendance allowance in amounts different from those specified in its Groupings.

The Committee supports the principles contained in the recommendations of the Ombudsman. Certainly in cases of this nature the Board must assess the individual attendance needs of the injured worker and the actual costs thereof having regard to the nature and extent of those needs and the particular location in the province where the worker resides. An injured worker might, within the meaning of Group 2 of the Board's guideline, require minimal service but the actual cost of that service might well be double or triple the attendance allowance stipulated by the guidelines.

The Committee, however, is unable to accept the recommendations of the Ombudsman as framed. The Board advised the Committee that its policy and guidelines in this area were constantly under review both in respect to levels of care and attendant costs. Since the Board has already assured the Committee that it does not rigidly adhere to these guidelines, it should not have to alter any policy but merely hereafter award the actual cost of "attendance" in each case.

THE COMMITTEE RECOMMENDS THAT THE APPEAL BOARD PANEL OF THE WORKERS' COMPENSATION BOARD IMMEDIATELY REVIEW ITS DECISION OF MARCH 12, 1979 TO DETERMINE THE REASONABLE AND ACTUAL COSTS OF PROVIDING SUPERVISION AND ASSISTANCE WHICH THE CONDITION OF THE COMPLAINANT REQUIRES AND IF NECESSARY INCREASE THE AMOUNT OF THE ATTENDANCE ALLOWANCE.[9]

THE COMMITTEE FURTHER RECOMMENDS THAT THE WORKERS' COMPENSATION BOARD REVIEW, BY JUNE 30, 1983, ITS POLICY CONCERNING ATTENDANCE ALLOWANCES TO TAKE INTO CONSIDERATION THE REASONABLE COST OF PROVIDING SUPERVISION FOR THOSE INJURED WORKERS WHO, AS A RESULT OF ACCIDENT, REQUIRE SOMEONE TO BE IN ATTENDANCE, IN ORDER TO PROVIDE THAT SUPERVISION.[10]

Complaint No. 20

This complaint concerns a decision of the Appeal Board Panel of the Workers' Compensation Board dated July 4, 1979 which denied the complainant's claim for a permanent disability pension on the grounds that the hearing loss suffered by the complainant was insufficient to warrant such an award. The Board in its decision found that the complainant had established a hearing loss and that because of the loss the complainant's employer felt obliged to assign him to a different position with a consequent decrease in wages. The Board already has granted a supplemental pension pursuant to Section 43(5) from the date of his transfer to the lower paying position.

The Ombudsman determined that, for periods between 1972 and 1975 and again from 1976 to 1977, the complainant was intermittently exposed to hazardous levels of industrial noise while working. In 1977 it was established that he had suffered a bilateral hearing loss. To avoid further deterioration of his hearing he was transferred by his employer to another department but at a lower wage.

In 1978 a medical specialist retained by the Board calculated the loss of hearing in the complainant's right ear at 25 decibels and 41 decibels in the left ear.

The Board's specialist concluded that the complainant had a sufficient degree of bilateral noise-induced hearing loss to warrant allowance for medical aid only but insufficient for a pension award.

The Board has refused the complainant's claim for a pension award on the ground that the cumulative affect of his hearing loss is not sufficient to be considered a compensable permanent disability. The Board has, pursuant to section 43(3) of the Act, formulated a rating schedule of percentages of impairment of earning capacity which is used to determine compensation in permanent disability cases. By that policy the Board has determined, presumably based upon medical and other relevant evidence that a hearing loss less than 35 decibels in both ears does not constitute a compensable permanent disability. That is, unless a person has suffered more than a 35 decibel loss in both ears, the Board refuses to accept that the permanent disability could have caused the required impairment in earning capacity. Accordingly, unless the hearing loss is greater than the 35 decibels in each ear no permanent disability award is made pursuant to Section 43 of the Act.

The Ombudsman further determined that the complainant did suffer a permanent hearing loss resulting from his employment. As a result of that loss the complainant could not continue his previous employment and was forced to accept other duties at a reduced wage, to eliminate the risk of further hearing deterioration.

The Ombudsman has interpreted Section 43(1) of the Workers' Compensation Act as requiring the Board to determine the impairment of a worker's earning capacity once it has been established that a permanent disability exists. He concluded from the circumstances of this case that the Appeal Board Panel, although acknowledging the existence of a permanent disability, had not considered the complainant's request for a permanent partial disability award or assessed the amount of the award.

His investigation further revealed that the Board determines eligibility in these cases by adopting the position that if a specific injury or disability does not meet the criteria established in the rating schedule formulated pursuant to Section

43(3), then compensable permanent disability does not exist for the purpose of Section 43(1). In other words, the Board determines whether an impairment of earning capacity exists by reference to a pre-determined rating schedule and not to the circumstances of each particular case. It has thereby abrogated its decision making under 43(1) to a predetermined policy. In the language of the section the "rating schedule" formulated in 43(3) "as a guide in determing the compensation payable in permanent disability cases" is employed as a fixed rule in determining compensable permanent disabilities. No other factors are considered by the Board.

Accordingly, the Ombudsman formed the opinion that such use of the 43(3) guidelines was not contemplated by the legislation and the Board, in failing to consider impairment of earning capacity first under Section 43(1), has fettered its discretion to assess the amount of a permanent disability award in this case.

He therefore determined pursuant to Section 22(1)(b) of the Ombudsman Act that the Appeal Board Panel in its decision of July 4, 1979 unreasonably failed to exercise its discretion to assess the complainant's claim by treating what are intended to be guidelines as prerequisites to entitlement and in so doing failed to give proper consideration to a claim for a permanent partial disability award. The Ombudsman therefore recommended, pursuant to Section 22(3)(c) of the Act

> "that the Appeal Board Panel should cancel its decision of July 4, 1979, grant a new hearing and reconsider (the complainant's) entitlement in this claim exercising discretion given to it under Section 42 (now 43) of the Workmen's Compensation Act."

The Board declined to implement the Ombudsman's recommendation on the grounds that the complainant's case was one wherein it was entirely appropriate to apply the 43(3) guidelines but only after it considered "all of the evidence". The Board took the position that failure to apply the guidelines in this case would have resulted in a decision which would have been "completely arbitrary". The Board maintained that it did exercise its statutory discretion only after determining that the guidelines "pertained to the circumstances of (the complainant's) particular case". The Board omitted to explain how this determination was made or what criteria it considers in deciding whether guidelines should pertain to this case.

The Committee understands that the Ombudsman intends by his recommendation that there should be an independent consideration by the Board on specific available evidence relevant to the complainant's particular circumstances and a specific finding of the Board that vis-a-vis his prior employment he is permanently disabled. The use of the guidelines should only be one factor to be considered by the Board in determining compensation, not disability.

The Committee supports the recommendation of the Ombudsman in this case. At the very least, the Board has given the appearance that its discretion has been fettered by a total reliance upon the provisions of the guidelines in making a determination of compensable permanent disability. The Board has decided for all purposes that a person who suffers less than a 35 decibel hearing loss in each ear does not have a compensable permanent disability. That the Board came to such a conclusion without considering specifically the circumstances of the complainant's hearing loss, prior employment, ability to continue in that employment and consequent diminution of earnings, lends support to the Ombudsman's conclusions.

ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE APPEAL BOARD PANEL CANCEL ITS DECISION OF JULY 4, 1979, GRANT THE COMPLAINANT A NEW HEARING AND RECONSIDER HIS ENTITLEMENT IN THIS CLAIM EXERCISING THE DISCRETION GIVEN IT UNDER SECTION 43 OF THE WORKERS' COMPENSATION ACT.[11]

Complaint Summary No. 21

This case concerns a complaint of an Appeal Board decision of the Workers' Compensation Board dated October 3, 1978 which rejects the complainant's claim for an increase in his permanent partial disability award beyond its then current 65 percent level. The Board found that the complainant had a pre-existing vulnerable personality; that many other factors besides the compensable accident and its sequelae aggravated his emotional state; that the complainant's psychological disability was not entirely related to the industrial accident of April 25, 1969; and that that accident was minor in nature with no significant triggering incident to cause any major psychological disability. These findings were made

notwithstanding that the complainant had never exhibited any symptoms of such a vulnerable personality prior to his "accident".

The Ombudsman, as a result of his investigation, found that on April 25, 1969 the complainant, then age 34, was employed as a machine assembler and was lifting heavy gear with two other employees when he strained his back. In December, 1970, the complainant suffered an exacerbation of back pain and was laid off from work. In May 1972 he underwent a laminectomy discotomy and spinal fusion.

The Ombudsman found that prior to the injury the complainant was successfully employed as a machine assembler, had received commendations and financial awards for contributions to his employer and did not demonstrate any psychological problems nor was he under any mental stress during the time he was employed prior to the "accident".

The Ombudsman formed the opinion, pursuant to Section 22(1)(b) of the Ombudsman Act, that the Appeal Board's decision, which found that the 35 percent award for the complainant's psychiatric disability was adequate, was unreasonable since there was insufficient evidence of a pre-existing psychological condition to justify any reduction in the award. He therefore recommended, pursuant to section 22(3)(g) of the Act

> "that the Board revoke its decision of October 3, 1978 and grant (the complainant) the full assessed value of its permanent partial disability pension recognizing the non-organic component of his disability."

The Board declined to implement the Ombudsman's recommendation. However, it agreed to reassess the complainant's case in terms of the current Board policy if the complainant were available for a complete up-to-date re-evaluation. By the Board's current policy a reduction in an award for psychiatric disability is made only to the extent to which the pre-existing condition is shown to influence the injured worker's pre-accident work record and social integration. From the evidence investigated by the Ombudsman there was no manifestation prior to the accident of any pre-existing emotional or psychiatric condition.

The Committee understands the Board's position to be in substance an acceptance of the Ombudsman's recommendation to grant the complainant the full assessed value of his permanent partial disability pension by the application of the current policy. However, the Board considers that the reassessment cannot occur because the complainant has permanently left the country and now resides in Israel.

The Committee supports, in principle, the recommendation of the Ombudsman in this case. The Board's position prior to its offer to reassess the complainant was in the Committee's opinion totally untenable when viewed against the available evidence. The Committee is unable to imagine how a partial disability pension can be reduced because of a presumed pre-existing psychiatric condition when no evidence or medical opinion is available that such condition ever existed or was ever manifested in the complainant's pre-accident behaviour.

The Committee further does not accept that a personal evaluation is necessary to reassess the complainant's entitlement against current policy. The Board throughout this case never assessed or examined the complainant personally before denying entitlement. If a decision to deny benefits can be made without a personal assessment so can a decision to grant benefits. However, the Committee has some difficulty in supporting the Ombudsman's recommendation for the period after the complainant left Canada permanently. The Committee believes that should be left to the Board to decide based upon its current policies and directives on the question of the payment of benefits to persons who no longer reside in Ontario or Canada.

ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE APPEAL BOARD PANEL OF THE WORKERS' COMPENSATION BOARD REVOKE ITS DECISIONS OF OCTOBER 3, 1978 AND GRANT THE COMPLAINANT THE FULL ASSESSED VALUE OF HIS PERMANENT PARTIAL DISABILITY PENSION RECOGNIZING THE NON-ORGANIC COMPONENT OF HIS DISABILITY UP TO THE DATE THE COMPLAINANT LEFT CANADA PERMANENTLY.[12]

THE COMMITTEE FURTHER RECOMMENDS THAT THE WORKERS' COMPENSATION BOARD ASSESS AND DECIDE WHETHER THE COMPLAINANT

SHOULD HAVE CONTINUING ENTITLEMENT TO THE INCREASED AMOUNT OF THE PENSION AFTER THE DATE HE LEFT CANADA PERMANENTLY.[13]

Complaint No. 22

This complaint concerns a decision of the Appeal Board Panel of the Workers' Compensation Board dated July 24, 1980 denying the complainant entitlement to a temporary supplement under the provisions of Section 42(5) (now 43(5)) of the Workers' Compensation Act.

On January 29, 1974 the complainant suffered a back injury during the course of his employment. The Board granted him entitlement for a lumbar disc degeneration with lumbar root irritation which required surgery in April 1974. For various periods during January 1974 and June 1978 the complainant was awarded temporary total and temporary partial disability benefits. In January 1978 a 20% permanent partial disability award was granted by the Board as a result of the residual low back disability caused by the "industrial" accident of January 1974. As a result of the injuries sustained at work, the complainant, in 1974, changed his occupation from an underground mine shift boss to a survey technician and draftman. The change in position resulted in a loss in earnings.

The main ground of the Board's denial of entitlement to a temporary supplement was that the complainant's post accident earnings at the time of the appeal exceeded his actual pre-accident earnings. The Appeal Board examined the complainant's post-accident earnings and concluded because they were in excess of 75 percent of the pre-accident earnings, the complainant was not entitled to benefits under Section 43(5).

The Ombudsman, by his investigation, found that the Board failed to consider all of the factors set out in its relevant policy (in determining whether a supplement was to be granted). By that policy the Board is required to take the following factors into account when considering a supplement:

(a) age;
(b) pre-accident occupation;
(c) years of service;
(d) education;
(e) locality;
(f) "other income", considered to be unemployment insurance benefits, supplementary unemployment benefits, Canada Disability Pension benefits, early retirement pension, long term disability pension;
(g) socio-economic factors; and
(h) the employee's availability for work.

In this case it only considered the relationship between current earnings and pre-accident earnings. The Ombudsman considered all factors against the relevant evidence and concluded that the complainant would be entitled to such a supplement.

He formed the opinion, pursuant to Section 22(3)(b) of the Ombudsman Act, that the Appeal Board Decision of July 24, 1980 was unreasonable as it did not address all of the appropriate factors to be taken into account when considering a supplement under Section 43(5) of the Workers' Compensation Act in order to determine whether the impairment of earning capacity of the complainant was significantly greater than was usual for the nature and degree of his injuries. He further concluded that under Section 43(5) of the Workers' Compensation Act the Board, in assessing entitlement to a temporary supplement, must determine first whether the complainant's impairment of earning capacity is significantly greater than is usual for the nature and degree of the injury and that such consideration must include an assessment of all of the factors contained in the Board's policy. He concluded that the Appeal Board had apparently satisfied itself with a comparison only of the complainant's pre-accident earnings and his present earnings which as the Ombudsman believed, by authority of the decision of the Divisional Court of the Supreme Court of Ontario in Re Gianoukakis and Workmen's Compensation Board (1978) 21 O.R. 2nd, p. 250, was contrary to law.

The Ombudsman accordingly recommended pursuant to Section 23(3)(g) of the Ombudsman Act

> "that the Appeal Board reconsider its decision, with a view to granting (the complainant) a temporary supplement to his permanent partial disability award, on the basis of a full consideration of the appropriate test for entitlement to such a benefit."

He further recommended pursuant to Section 22(3)(f) of the Act that the reasons be given for the Board's decision after reconsideration.

The Committee understands that the Ombudsman by his recommendation does not require that a temporary supplement be granted, although he believes entitlement is justified. Rather, he wished the Board to reconsider the matter giving full and appropriate consideration to all of the factors in its policy.

The Board accepted the Ombudsman's recommendations and in fact reconsidered its decision in November, 1981. The Board, after stating that it had carefully considered the conclusions and recommendations of the Ombudsman as well as the provisions of Section 43(5) of the Workers' Compensation Act and the circumstances of the complainant's case, concluded that the complainant's impairment of earning capacity was not "significantly greater than is usual for the nature and the degree of his injury". In its decision the Board noted that its policy with respect to the determination of whether impairment of earning capacity is significantly greater than usual requires it to take into account income from sources other than any permanent disability award under Section 43(1). If the income from all the sources in addition to the pension award exceeds 75 percent of the pre-accident wage, the Board then considers that the impairment of earning capacity is <u>not</u> significantly greater than usual, having regard for the nature and degree of the injury.

The Board believes that its reconsideration included a specific consideration of the "threshold question" of whether impairment of earning capacity was significantly greater than usual, having regard for the nature and

degree of the injury. However, the Board appears, in addressing that "threshold question", to have based its decision totally on a comparison of current income to pre-injury income. The Board has apparently adopted a policy that anyone whose current earnings from all sources exceeds 75 percent of pre-accident income, cannot be considered one whose earning capacity is significantly greater than is usual for the nature and degree of the injury.

The Ombudsman is of the opinion that the Board's reconsideration of its initial decision with the reasons set forth is not an adequate or appropriate response to his recommendations. He believes that the reconsideration does not answer the concerns set out in his report. He also believes that the reconsideration is contrary to the Gianoukakis decision.

The Board, on the other hand, takes the position that in determining the "threshold question" whether earning capacity is significantly greater than usual, it is entitled to base its decision solely on the comparison of current to pre-accident income.

The question therefore that the Committee must decide is whether the the Board's reconsideration is an adequate or appropriate response to the Ombudsman's recommendations. There is no doubt that, whereas the Board's policy requires it to take seven factors into consideration when considering a supplement of this nature, the Board here decided the matter exclusively on the "other income" factor in its policy.

The Committee notes that the policy (document 33 20 02; See Schedule 4) does not provide that if a worker's current earnings exceed 75 percent of his pre-accident earnings he or she shall be not be entitled to a 43(5) supplement. Nor is there any such provision in the Board's directives. (Schedule 5). Section 43(5) itself clearly does not provide that current earnings in excess of 75 percent of pre-accident earnings shall be the sole criterion in concluding that impairment of earning capacity is not significantly greater than is usual for the nature and degree of injury.

The Committee, after carefully considering the positions of the Ombudsman and the Board, together with the relevant Board policies and directives and the Gianoukakis decision of the Divisional Court of Ontario, is of the opinion that the Board's response to the recommendations is neither adequate nor appropriate. The Board's policy and all applicable directives do not provide that the "threshold question" of whether impairment of earning capacity is significant greater than is usual shall be determined solely on the basis of a comparison of current earnings to 75 percent of pre-accident earnings. Nor do the policy and directives provide that all factors and circumstances to be taken into account must be satisfied before entitlement is granted. Rather, the Committee notes that the directive of the Board dated January 13, 1976 (4,500-7, Section 12) provides that

> "any usual cases which do not meet the general criteria will be dealt with equitably and fairly having regard to the provisions of Section 42(5) (now 43(5))."

The Board is prepared, in appropriate circumstances, to determine the question of entitlement, including the degree of impairment of earning capacity upon a consideration of factors other than those stipulated in its policy and specifically regardless of the result of a comparison of current earnings to pre-accident earnings.

The question given by the Statute for the Board to answer in these circumstances is whether "the impairment of earning capacity of the employee is significantly greater than is ususal for the nature and degree of his injury". The Board answered that question by regard solely to a comparison of current earnings to pre-accident earnings. In the Committee's opinion it is arguable that the Board has failed to deal with the question remitted to it. The law is clear that if the Board asks itself a wrong question it steps outside its jurisdiction and its decisions are clearly reviewable. This in itself would justify the Ombudsman and this Committee in concluding that the Board's response is neither adequate or appropriate.

The Board seems to feel justified in assessing and denying entitlement in the way it has because the Gianoukakis decision does not deal specifically with the

"threshold questions" of impairment of earning capacity. The Board derives some comfort from the comments of Mr. Justice Osler that:

> "The decision does not specifically state whether the Board has examined the evidence to determine if "the impairment of earning capacity...is significantly greater than is usual for the nature and degree of his injury...". Should the Board have stated that such evidence did not persuade it that such was the case we are all of the opinion that Section 74(1)...of the Act would have prevented this Court from reviewing its decision".

The Board is wrong if it believes that the Court by that statement has authorized the Board to determine the question of eligibility for 43(5) benefits in any manner whatsoever. The Court clearly intended by its comment that the Board must determine the question of impairment of earning capacity based upon all relevant evidence and factors. That was not done in this case.

ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE WORKERS' COMPENSATION BOARD RECONSIDER ITS DECISION OF JULY 24, 1980 AND ITS DECISION OF NOVEMBER 9, 1981 WITH A VIEW TO GRANTING THE COMPLAINANT A TEMPORARY SUPPLEMENT TO HIS PERMANENT PARTIAL DISABILITY AWARD, ON THE BASIS OF A FULL CONSIDERATION OF ALL RELEVANT EVIDENCE AND FACTORS.[14]

Part V - Communications Received from the Public

The Committee continues to receive communications from the public. These communications have dealt primarily with comments and concerns respecting the organization and operation of the Ombudsman's office. The majority have been from persons who have lodged complaints with the Ombudsman's office. Since its last report the Committee has not considered any communications received which would warrant any discussions in person to assist it in carrying out one or more of its terms of reference. It will continue to receive these communications and consider them against its terms of reference.

Part VI - Rules for the Guidance of the Ombudsman in the Exercise of his functions under the Ombudsman Act

The Committee did not consider that any matter considered during its recent hearings warrants the formulation of any additional rules for the guidance of the Ombudsman in the exercise of his functions. In any event, the forthcoming consideration by the Committee of amendments to the Ombudsman Act will of necessity include a consideration of this whole question. Accordingly, the Committee defers any further comment until that time.

However, there appears to be a difference of opinion between the Ombudsman and the Committee on the nature and extent of his functions contained in the Act and in consequence the extent of the Committee's term of reference to formulate general rules.

The Ombudsman has informed the Committee that he believes his functions are confined to investigating the subject matter of complaints and to reporting either specific matters or annually to the Legislature. He believes that the Committee's authority to enact rules is confined to those two functions.

The Committee does not concur with the Ombudsman's position in this matter. It does not intend here to present an exhaustive list of circumstances involving the Ombudsman and his office wherein it has the authority to enact general rules. It merely wishes to comment at this time that the Act clearly contemplates by Section 16(1) that the Ombudsman has multiple functions, not just the single investigating function to which Section 15(1) refers. It is a question of construction of the Act whether the definition of functions includes something more than investigating and reporting. The Committee believes that it does.

Section 16(3) of the Act permits the Ombudsman to "determine his procedures". However those procedures are by that subsection subject to "any rules made under this section". The Committee, therefore, clearly has authority to formulate and propose to the Legislature rules to which any procedures formulated by the Ombudsman will be subject. In fact this was done by the Committee in

previous reports adopted by the Legislature and readily accepted by the first Ombudsman.

The Committee does not view this disagreement as insurmountable. It is even understandable that the Ombudsman has adopted an interpretation of his functions and the Committee's authority in somewhat narrow terms. The Committee is confident that any further disagreement in this area can be resolved in the best interests of all concerned.

SCHEDULE 1

HON DONALD R MORAND

The Ombudsman | Ontario

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September 15, 1982

Mr. Robert Runciman, M.P.P.
Chairman
Select Committee on the Ombudsman
Legislative Buildings
Toronto, Ontario
M7A 1A2

Dear Mr. Runciman:

I am writing you this letter because, having read the transcript of the hearings of the Select Committee on the Ombudsman for the morning of Tuesday, February 9th, 1982 and for Wednesday, March 10, 1982, and Tuesday, September 8, 1982, and after hearing the intentions of some of the Committee members to review our budget priorities, I am deeply disturbed . My concern stems from the comments, made by some of the members of the Committee, respecting my "travels" and from the Committee's request for a copy of my Office's budgetary submission to the Board of Internal Economy, and salary and job description information for all of my employees.

The fact that no formal response has been forthcoming should not be taken as an indication that I have ignored the Committee's request. Mr. Goodman replied to your letter on February 1, 1982, asking for certain additional information which he felt was necessary in order that I could respond to you. He also had telephone conversations with you, Dr. Graham White, and the Secretary of the Board of Internal Economy, Mr. Flemming, on the subject of the Committee's request. More recently, Mr. McArdle of my Office spoke with you and provided you with documentation containing certain salary information respecting my employees.

I share the view expressed by some of the members, that a confrontation between the Committee and the Ombudsman would serve no one - least of all the citizens of this province. History has proven this to be the case. We should therefore strive together to do our best to ensure that history does not repeat itself by assiduously avoiding a confrontation, if this is possible. It is for that reason and with that purpose in mind, that I am writing you this letter.

I think you would agree that I have demonstrated over the past three years that I am prepared to cooperate with the Committee, within reason. The members of my staff and I have, on occasion, provided information at the Committee's request, which did not strictly fall within the terms of reference of the Committee, as referred by the Legislature. This information was provided, notwithstanding my

jurisdictional concerns, because I felt that it was in the best interest of this Office and the work of the Committee, that this be done. However, where in my view a request by the Committee, which clearly exceeds its mandate, impinges on the very independence of the Office of the Ontario Ombudsman, the line must be drawn - and it is accordingly here that I have drawn it.

It is my respectful submission to you that the reason for the Committee's dilemma is simply: some Committee members still lack a basic understanding of the mandate of the Select Committee on the Ombudsman, as that mandate relates to the Ombudsman.

The Select Committee on the Ombudsman was created on the motion of the Premier, seconded by the then Leader of the Opposition on July 15, 1976. As your Committee Clerk, Mr. Graham White, noted in his excellent memorandum of June 25, 1981 entitled, "An Outline of the Work of the Select Committee on the Ombudsman", the striking of the Committee was precipitated by my predecessor's presentation of a special report, pursuant to section 22(4) of the Ombudsman Act, to the Assembly respecting the Ministry of Housing's Land Acquisition Program in North Pickering. The seriousness of the matter clearly demanded evaluation and response by the Assembly, yet no vehicle existed for the consideration of the Ombudsman's report and of the Ministry's response. A small committee was the obvious forum for the House to deal with the issue, and generally with Ombudsman reports, both special and annual.

The relevant portion of the precise motion passed by the House on July 15th was as follows:

> Ordered, That a Select Committee of this House be appointed to review from time to time the reports of the Ombudsman as they become available, to report thereon to the Legislature, and to make such recommendations as the Committee deems appropriate; reports and recommendations of the Committee to be placed on the order paper for discusson after presentation.

The foregoing constituted the Order of Reference of the Select Committee until December 16, 1976, when on motion by Mr. Welch, seconded by Mr. Renwick, the Assembly passed a further motion extending the mandate of the Committee by authorizing it to formulate general rules for the guidance of the Ombudsman in the exercise of his functions under the Ombudsman Act.

As you know, section 16 of the Ombudsman Act provides as follows:

> 16(1) The Assembly may make general rules for the guidance of the Ombudsman in the exercise of his functions under this Act.

(2) All rules made under this section shall be deemed to be regulations within the meaning of the Regulations Act.

(3) Subject to this Act and any rules made under this section, the Ombudsman may determine his procedures.

On October 29, 1975, the House had appointed a Select Committee, chaired by Mr. Vernon Singer, "to consider and set out general rules and guidelines for the guidance of the Ombudsman". This Committee reported in December, 1975, and thereupon ceased to exist.

One of the principal recommendations of the 1975 Select Committee was that a permanent Committee of the Legislature be struck to review:

(a) the reports of the Ombudsman as they become available from time to time;

(b) the estimates of the Ombudsman; and

(c) the actions, or lack of action, taken by those persons referred to in the Ombudsman's reports, and report in connection with these matters to the Legislature from time to time.

As you are aware the Legislature did not accede to this recommendation.

The terms of reference of the Select Committee have varied somewhat over the years, but its principal tasks, as they relate to the work of the Ombusman, have always been to review the reports of the Ombudsman and to formulate general rules for the guidance of the Ombudsman in the exercise of his functions under the Act, and thereafter to report to the Assembly. This letter will not concern itself with the Committee's subsequent term of reference respecting universal political rights.

The rule-formulating mandate of the Select Committee, as entrusted to it by the Legislature, clearly relates only to the exercise by the Ombudsman of his functions under the Act.

Section 15(1) of the Act provides that, "The function of the Ombudsman is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a governmental organization and affecting any person or body of persons in his or its personal capacity." (Emphasis added.) I am further required by the Act to report the results of my investigations, and to report annually to the Legislature.

The Legislature has made it abundantly clear in section 8 of the Act that, subject to the approval of the Lieutenant Governor in Council, it is for the Ombudsman to "employ such officers and other employees as

the Ombudsman considers necessary for the efficient operation of his office," and for the Ombudsman "to determine their salary and remuneration and terms and conditions of employment" (emphasis added).

The Ombudsman is also empowered to lease premises and acquire equipment. These powers are conferred upon the Ombudsman to assist him in carrying out his functions of investigation and report; by no stretch of the imagination do these powers constitute the Ombudsman's functions under the Act.

The mandate of the Select Committee clearly does not extend to requesting or considering the salaries, staff complement and job descriptions of the members of my staff. The members of the Committee misconceive the mandate of the Committee when they refer to it as "overseeing" the Office of the Ombudsman insofar as the remuneration of my employees is concerned, and that the Committee is "analogous to a management consulting firm brought in by a company to make proposals for improvements". While the Committee does consider the work of the Ombudsman's Office, such consideration is limited to the Order of Reference by the Legislature.

Our Legislature has ensured, by the inclusion of section 8(1) and other procedural safeguards, that the Ombudsman is not only independent of the administrative arm of government but is also free in the day-to-day operation of his Office from interference by the political arm of the Legislature.

I agree wholeheartedly with my predecessor that the principles of impartiality in the future operation of the Office of the Ontario Ombudsman would be threatened if the Select Committee on the Ombudsman were to involve itself in such questions as the remuneration and job descriptions of staff of the Ontario Ombudsman's Office. In order for the Ombudsman to function impartially and independently, he must be free from the control of any body, with the exception of the Legislature, which alone has authority to remove him for cause.

Many of the points which I have made thus far were made by Mr. Maloney in his letter of March 18, 1977 to the first Chairman of the Select Committee, Mr. James Renwick. The letter was written in response to a request by Mr. Renwick to Mr. Maloney for an outline of the reasons for his position that the Select Committee lacked the authority to inquire into a complaint by Patrick Reid, M.P.P. against two members of Mr. Maloney's staff. I share Mr. Maloney's view that had he or any member of his staff participated in a consideration by the Committee of a complaint by a Member of Provincial Parliament against members of his staff, this would have compromised the independence of the Office of the Ontario Ombudsman. The complaint by Mr. Reid had absolutely nothing whatsoever to do with the Ombudsman's functions of investigating and reporting, and as such was beyond the authority of the Committee.

Insofar as the Committee's request for my budgetary submission made to the Board of Internal Economy is concerned, I wish to make the

following points. First, I have already mentioned that the 1975 Select Committee on Guidelines recommended that a permanent committee of the Legislature be struck to review, among other things, the estimates of the Ombudsman. The recommendation respecting estimates was not acted upon by the Assembly. As early as 1977, the Select Committee on the Ombudsman recommended that its Order of Reference "be expanded to provide that it review from time to time the estimates of the Ombudsman as they become available, to report thereon to the Legislature, and to make such recommendations as the Committee deems appropriate". (Second Report, Recommendation #29.) The Assembly likewise failed to implement this recommendation. The Committee renewed this recommendation in its Third Report (Recommendation #41), its Fifth Report (Recommendation #52), and most recently in its Ninth Report (Recommendation #7), which has yet to be discussed in the Legislature,. The Legislature has not seen fit to comply with these recommendations.

As the Committee noted in its last report, on June 19, 1978, the Board of Internal Economy agreed that:

> The Chairman of the Ombudsman's Committee be invited to attend meetings of the Board of Internal Economy to observe the preliminary examination by the Board in establishing the Ombudsman's estimates and that these estimates be sent to the House with the recommendation that they be referred to the Ombudsman's Committee for review.

Although the Assembly declined to implement the Board of Internal Economy's recommendation, I understand that an agreement was reached between the Speaker and the Chairman of the Select Committee whereby it was confirmed that, in accepting an invitation by the Board to observe the preliminary examination of the Ombudsman's estimates, the Chairman would be doing so as an observer only, and would be free to discuss his observations with members of the Committee.

As a result, both you and your predecessor, Mr. Lawlor, have been present when the preliminary examination by the Board of Internal Economy has taken place in establishing the Ombudsman's estimates. The present budgetary process for the Office of the Ombudsman provides for the Ombudsman's estimates and supplementary estimates to be considered by the Board of Internal Economy. Unless and until the Order of Reference of the Select Committee is amended to include the authority to consider my Office's estimates, or the Ombudsman Act is so amended, I do not intend to provide the Committee with my budgetary submissions made to the Board of Internal Economy, beyond what appears in printed estimates. Nor do I intend to participate in any discussion by the Select Committee of my budgetary submissions. To do so would be contrary to the wishes of the Assembly, which has declined to this date to give the authority to the Select Committee to consider my estimates and supplementary estimates.

My detailed budgetary submission to the Board of Internal Economy will not assist the Committee in fulfilling either its mandate to

review the reports of the Ombudsman or its reference to formulate general rules for the guidance of the Ombudsman in the exercise of his functions under the Act, and thereafter to report to the Assembly.

The mandate of the Select Committee clearly does not extend to requesting or considering the salaries, staff complement and job descriptions of the members of my staff. Committees cannot institute inquiries beyond their terms of reference. This point has been repeatedly made by Erskine May, Arthur Beauchesne, and most recently by the Ontario Law Reform Commission at page 22 of its Report on Witnesses before Legislative Committees.

In summary then, I do not intend to provide the Committee with the budgetary information which it has requested for the following reasons:

(1) The request exceeds the Order of Reference set forth by the Assembly;

(2) The provision of the information will not assist the Committee in carrying out its terms of reference;

(3) To provide the requested information would be to flout the wishes of the Assembly which has thus far declined to amend the Order of Reference of the Committee to consider my estimates, despite five Committee recommendations to this effect;

(4) Most important, to provide the requested information without the Legislature having amended the Order of Reference, would be to compromise the independence of the Ombudsman in his day-to-day operation of the Office from interference by the political arm of the Legislature.

I have now had an opportunity to consider Mr. Philip's request, made at the September 7, 1982 afternoon sitting of the Committee, that I table with the Committee the objectives and costs of each trip referred to in my Ninth Report. This letter will also constitute my reply to Mr. Philip's request, through you as Committee Chairman.

Insofar as the objectives are concerned, they have already been addressed in my letter to you of March 10th, 1982 in my Ninth Report, and most recently in my opening statement before the Committee.

I do not intend to table with the Committee the costs related to my trips. I am accountable for the manner in which Office monies are expended - including monies for travel - but not to the Select Committee on the Ombudsman. Section 11 of the Ombudsman Act provides that the accounts and financial transactions of the Office shall be audited annually by the Provincial Auditor. Since my tenure as Ombudsman, the Auditor has not seen fit, in his report to the Legislature, to be critical of monies expended by me for travel, nor have my accounts been referred to the Public Accounts Committee.

As you know, my estimates invariably include an amount for travel. Since you were present when my 1982/83 estimates were considered on December 14, 1981, you will no doubt recall that, at the meeting of the Board, specific reference was made by me and Board members to my projected trip in January to Fiji for the meeting of the Consultative Committee for the next World Ombudsmen's Conference. You will also recall that my Executive Director, Mr. Frank McArdle, referred in his letter to you of December 4, 1981, in addition to the Fiji meeting, to meetings that had been arranged with Ombudsmen in Hawaii, Australia and New Zealand, following the Fiji gathering. As I explained in my letter of March 10th, 1982 to you, such meetings are invaluable since they enable me to further my knowledge at first hand of the workings of Ombudsman offices around the world, in order that I may apply that knowledge to the better working of the Office of the Ombudsman of Ontario.

Mr. Philip's request for the costs associated with my foreign travel cannot be complied with for the identical reasons that I have outlined above in connection with the Committee's request for my budgetary submission to the Board of Internal Economy.

As I explained in my opening statement before the Committee, I firmly believe that a Select Committee can be a valuable complement to an Ombudsman's office, provided that each works closely with the other, while at the same time respecting their different spheres of responsibility. Although the Committee and the Ombudsman will not always seen eye to eye on all matters, there has, at least since the inception of my term of office, existed a mutual respect and the feeling that the overall administration of this province is perhaps a little more sensitive and responsive as a result of the existence of both the Ombudsman and the Select Committee.

I am confident that you will receive the observations and concerns expressed in this letter in the constructive manner in which my comments were intended, and that the results will make for an even improved relationship between your Committee and my Office.

Yours sincerely,

Donald R. Morand

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HON. DONALD R. MORAND

The Ombudsman | Ontario

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March 10th, 1982

Mr. Robert Runciman, M.P.P.
Chairman
Select Committee on the Ombudsman
Legislative Building
Toronto, Ontario
M7A 1A2

Dear Mr. Runciman:

I understand that, although a specific date has yet to be set, the Select Committee's Ninth Report on the Ombudsman will shortly be debated in the House. I had hoped to have an opportunity, before the Committee's Report was discussed in the Assembly, to "set the record straight". Since I may not have an opportunity before the Ninth Report is debated, I thought I might write to you as I feel it is important to the proper functioning of my Office that these errors not go unanswered.

Much attention has been focused on my Office and some of that attention arose as a result of actions by members of the Select Committee, some as a result of my own actions and some resulted from actions outside the scope of the Committee or my Office.

I should like to make clear certain facts, to correct certain misinformation, and misinterpretation of figures and omissions and some misconceptions which have arisen as a result of that misinformation.

Since I presume that everyone understands that it is impossible for me to personally deal with every one of the more than 10,000 complaints that come into the Office yearly, then it is my excellent and dedicated staff who have had to bear the brunt of the media report errors and misinformed criticism of the Ombudsman's Office in the past few weeks.

I think perhaps that criticism can be categorized in three ways. First, that there are far too many staff, far more than in any other Ombudsman's Office in any jurisdiction. Secondly, that the staff is made up mainly of lawyers, and third, and perhaps most important, that they take far too long to deal with complaints brought before the Ombudsman's Office.

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Let me deal first with my staff size, which has been compared unfavourably in certain media reports, to those of Ombudsmen in other jurisdictions, such as Denmark, Sweden, Israel and Great Britain.

I do not believe that such comparisons serve the people of Ontario well. In the first place, the staff figures for these jurisdictions were reported incorrectly, and do not take into account the number of complaints received by these offices.

Great Britain's Ombudsman, for example, can act only on complaints from members of Parliament, not directly from private citizens. And with a staff of 88, and not 56 as reported in the press, he received only 1,031 complaints in 1980, whereas my Office dealt with some 10,869 complaints. Were he to receive as many complaints as my Office, he would require a staff of 928 people.

Denmark, in 1979, with a staff of 23 received 1,513 complaints; Sweden, in 1979/80 with a staff of 55 received 3,361 complaints; Israel, in 1979/80, with a staff of 83 received 6,832 complaints.

I would suggest to you that statistics comparing the staff and complaint load of the Ontario Ombudsman's Office with other offices elsewhere are misleading. Numbers alone can be misinterpreted because they fail to recognize that different Ombudsmen have different terms of reference and organizational models.

I should point out further that many Ombudsmen rely on government service departments to handle purchasing, payroll and a great many other administrative functions. In my Office, we handle all of those things ourselves.

As to the allegation that my Office has too many lawyers on staff - I think a phrase I have seen used in the newspapers is "a staff of 122 lawyers, investigators and administrators" - the truth of the matter is there are twelve lawyers on the staff of the Ombudsman, and six of those are there in an advisory capacity, attached to the Legal Directorate. All of my investigators, those people who deal directly with the people of Ontario and their complaints, are not lawyers except two. The other four are in administrative positions: my Executive Director, my Counsel and Special Advisor, my Director of Investigations and an Assistant Director.

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However, the complexity of some of the complaints which are brought before the Ombudsman is such that in many cases a legal opinion is required to unravel some of the rather tortuous mazes into which people have inadvertently wandered. As a lawyer myself, I can hardly agree with the suggestion that having twelve lawyers out of a staff of 122 is necessarily evil, but even if it is, I would think that even the most vociferous critic would agree that it is a necessary evil.

Great attention has been paid in the media reports to the figure quoted from the Select Committee's Report of "an average of 207 days" for my Office to settle a citizen's complaint. The statistic referred to, which is found on page 22 of the Select Committee's Ninth Report, is in reference to the average length of time to close a complaint which was documented in a file. It certainly is not the average length of time spent on all cases, that is, all complaints brought before the Ombudsman's Office.

I should like to explain that not all complaints received in the Office of the Ombudsman are documented in files. This is an important distinction, because, in order to eliminate unnecessary paper work, expense and delays, my Office has instituted a procedure whereby no file was opened for complaints that could be handled with minimal follow-up. This included, of course, a large number of complaints from inmates in correctional facilities and psychiatric institutions. One result of this streamlining was to inflate our duration-to-file-closing statistics. In previous years, these very straightforward, short duration complaints were always included in the calculation of the average duration-to-closing figures.

The duration of 207 days was calculated excluding the 4,687 no follow-up complaints and information requests that the Ombudsman received. Actually, my Office closed 6,182 complaints which were documented in files, plus 4,687 no follow-up complaints and information requests, for a total of 10,869.

Of this total, 53.6% were closed within a month, 69.5% within three months, and 82% within seven months, which is the figure that most closely parallels the figure of 207 days mentioned in the Select Committee's Report. 85.9% were closed within nine months, and 89.6% within one year. Only about 10% of the complaints took longer than a year to close, and this of course, because some of them are of an extremely complex nature. If we were to calculate the overall duration taken to follow-up and close every complaint that came into the Ombudsman's Office, we would find that the figure would be approximately 120 days.

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I have recently had occasion to review the average length of time taken to close a complaint documented in a file by my Office for the three most recent fiscal years, in light of the observations of the Committee and I quote: "the statistical duration has increased by over 100% within the span of 24 months".

My review has revealed that the average duration for a complaint documented in a file in the fiscal period 1978/79 was 127 days, rather than the 101 days previously reported by my Office, and carried by the Committee in its Report. When I next appear before the Committee, I would be pleased to explain the reason for this discrepancy.

The consequence of the error with respect to the 78/79 fiscal period is that the average duration to closing respecting complaints documented in files has increased by 63% over the two fiscal periods, and not by "over 100%", as reported by the Committee and the media.

The average time taken to close a complaint documented in a file for two succeeding fiscal periods was correctly reported by me, and therefore by the Committee, as 153 days and 207 days respectively.

Further, a review of pages 1 through 3 of the Ombudsman's Eighth Report and the transcript of the proceedings of the Select Committee in September when our statistics were considered will reveal that, contrary to the Committee's assertion at page 22, our Office never attributed administrative changes vis-a-vis file openings and closings as a full explanation for the increase in file duration over the last two fiscal periods. Rather, specific reference was also made to the expansion of administrative fairness procedures and a "push" on more complicated and older jurisdictional complaints which required more than 6 months to complete.

By any standard, the fiscal year 1980/81 was a banner year, statistically, for the Office of the Ontario Ombudsman. A total of 6,182 complaints documented in files were closed, which represented an increase of 743 complaints when compared with the previous fiscal year. The number of files remaining open in the Office was reduced from 2,714 for the previous fiscal year to 1,634 - a very substantial drop of 40% or 1,080 files.

Having regard to the extremely complex and time-consuming nature of some of these complaints, I think I have a right to be proud of the speed and consideration with which my staff has protected the rights of Ontario citizens, and the people of Ontario may have confidence that a complaint to the Ombudsman will continue to be handled with speed and consideration.

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My Office's investigation of a student award complaint has also attracted press criticism due to an interview with Mr. David Cooke, M.P.P. with the newspapers. He first contacted my Office about the Student Awards Branch computer programming error which had led to an overpayment being recollected, in a letter dated August 27th, 1980. Mr. Cooke asked me to look into the whole matter, as well as the specific case of one of his constituents. On September 5th, 1980, my Co-Ordinator of Researchers told him that, although we did not have the authority to require the Ministry of Government Services to suspend collection, in the past it had been co-operative, and we would request that they hold off collections in this case. On September 9th, my Co-Ordinator spoke to the Manager of Central Collections of Government Services to make this request. The Manager said that it might be possible to authorize a temporary suspension of collection, but that he would need authority from the Ministry of Colleges and Universities for anything longer.

On September 19th, 1980 notices of intent to investigate were sent to the Minister of Colleges and Universities asking her to consider instructing the Ministry of Government Services to postpone collections, on the understanding that we would attempt to complete the investigation within three months. On October 15th, the Minister delivered her response by hand, pointing out that the constituent's reassessment had not been caused by a computer error. Rather, in his Student Loan application the student had underestimated his parents' income, and Dr. Stephenson said she could not direct that collections be postponed because of the administrative difficulties this would cause Central Collections.

Mr. Cooke was sent a copy of this letter on October 20th and on November 3rd, he replied, saying that even if his constituent's overpayment was not caused by a computer error, we should still examine the case to see if quicker procedures could be worked out. On November 27th, 1980, the file was assigned for investigation. On December 15th, 1980, the investigator contacted Mr. Cooke, explaining that we were investigating the computer error cases. The investigator said we could also investigate his constituent's case, but we would need to contact him for further information. She also told Mr. Cooke that if his constituent did not want us to investigate, we would then close our file. After several phone calls, the investigator was able to reach the complainant on December 19th, 1980. He did not feel that our investigation could help him, since what he wanted was immediate suspension of collections until the following April, when he would be out of school, and the investigator offered to contact Central Collections informally to see if it would agree to this. While they did not agree, they did offer to talk to the complainant. Our investigator reached him again by telephone on December 22nd, and invited him to contact Central Collections direct. He stated that he would do so when

he returned from his vacation in January. He restated his wish to withdraw the complaint and thanked the investigator for her efforts. The Ministry of Colleges and Universities, Mr. Cooke and the complainant were all informed in writing that the complaint had been withdrawn. As you can see in this case, it was four months from the time that Mr. Cooke first wrote to me until the time his constituent confirmed his wish to withdraw his complaint.

Meanwhile, in October 1980, another complainant, who was a computer error case, contacted us on her own initiative objecting to being required to repay her grant overpayment, and contending that the repayment schedule which had been requested by Central Collections was unreasonable. She also questioned the legality of the Ministry of Colleges and Universities' decision to recover the overpayent.

I can obviously go through a complete list of actions taken by my Office, both in the fact-finding portion of the investigation, in the obtaining of a lengthy legal opinion concerning the Ministry's legal entitlement to recover grant overpayments, and the final review by the Ombudsman and the issuing of a report. Incidentally, Mr. Cooke was kept informed at all stages as to what was happening.

Further, our complainant made no payments on her grant overpayment until after our investigation was completed. Even if she had repaid part of the amount owing, this would not have prevented me from recommending that the amount be forgiven, had I thought it appropriate to do so. Therefore the length of time taken to resolve this complaint had no bearing upon the eventual outcome.

My final report, finding the complaint to be unsupported, was issued to the complainant, Mr. Cooke and the Ministries of Colleges and Universities, and Government Services on August 27th, 1980. Thus, the handling of this complainant's case took approximately eleven months, and not the year and a half referred to in press reports.

The Globe & Mail account of how I dealt with the cases of 135 injured workers complaining about their Workmen's Compensation disability awards is also, in part, incorrect. As you know, the Committee did not recommend that the Ombudsman ask the Cabinet to refer the legal issue to the Courts, but made this recommendation itself. Further, my Office voluntarily undertook before the Committee, and as such prior to the Committee's Ninth Report, to investigate anew the 135 cases to determine if anyone had been dealt with unfairly, even within the Workmen's Compensation Board's interpretation of the law.

Some media reports have suggested that I may be too conservative and too quiet. It has been said that, as compared to my predecessor, I am rather a low-key Ombudsman. Certainly my style is to attempt to get things done by nibbling away behind the scenes if I feel I can successfully resolve a complaint, rather than biting for all to see. However, as you well know from the Committee's consideration of recommendation denied cases, I am prepared, if necessary, to go to bat all the way for a complainant, whose grievance I have found to be supported after investigation.

As for being too quiet, my Office continues to take steps to ensure that the concept of the Ombudsman's Office and its services to the people of Ontario are made known. This is done through the circulation of our excellent film and brochures, by holding of hearings throughout the Province where complaints may be lodged, by the acceptance of speaking engagements on every possible occasion by myself and members of my staff, in the participation in TV and radio interviews, and interviews with members of the press, and finally in the initiation this month of a radio advertising campaign in major centres throughout Ontario. This campaign is designed to remind the people of Ontario of the services of the Ombudsman's Office, and as the advertisement itself says, the fact that the Ombudsman is here to help them.

The Globe & Mail article referred to earlier, quoted Mr. Shymko as saying that it was inexcusable that the Ombudsman is not listed under O in the white pages of telephone books. I happen to agree with Mr. Shymko since I did, in fact, request that our telephone number be so listed. I have attached a copy of a letter sent to me by Allan Gordon, Deputy Minister of Government Services wherein he apologizes on behalf of Bell Canada and the Ministry of Government Services for the inconvenience which has been caused to the public by the omission from the white page listings, and the listing in the Services section of the blue pages.

Some of the media accounts have implied that my travelling abroad might be considered prejudicial to the operations of the Ombudsman's Office here at home. David Cooke, M.P.P. appears to raise this as an issue in his letter to you of January 8th, 1982, wherein he writes that "to think that from late fall 1981 to early spring 1982 Mr. Morand will have travelled on three occasions to three distant countries..." This is simply untrue, and it is unfortunate that Mr. Cooke failed to query me about my travels, since this misinformation subsequently appeared in several newspapers across Canada and Ontario and especially in copies of the Windsor Star, the Toronto Star, and the Globe & Mail, to each of whom he did send a copy. I would like to set the record straight on my travels as well. I have travelled on only one occasion since the fall of 1981 to "a distant country", and that was in

January of this year to a meeting in Fiji of the Consultative Committee planning the next International Ombudsman's Conference.

The concept of an Ombudsman's Office is a relatively new one in Ontario. As you know, the Office itself has been in operation for less than seven years. Both my predecessor and I have striven to make this Office into what I believe is the best and most efficient Ombudsman's Office in the world. The Committee in its Ninth Report indicates that it shares my view that the Ontario Ombudsman's Office is "first class".

However, in order to ensure that our Office is second to none, it is important that we study, and continue to study, ways in which the Office may be made more efficient, more caring, and more serving of the needs of the people of Ontario.

At the second International Ombudsman's Conference held in October, 1980 in Jerusalem, I was honoured to be elected by Ombudsmen from all around the world, a member of the Consultative Committee for the next conference, which takes place every four years.

On my way to the Jerusalem Conference I visited a number of Ombudsmen and complaint handling offices. Following the meeting of the Consultative Committee in January of this year in Fiji, I visited Ombudsman offices in Hawaii, Australia and New Zealand.

Your predecessor as Chairman of the Committee, Mr. Patrick Lawlor encouraged me to visit other Ombudsmen and similar complaint handling offices to provide me with a more informed analysis of how my Office could better serve the people of Ontario.

Contrary to the media reports, I do not travel to "spread the Ombudsman concept" but rather to further my knowledge at first hand of the workings of Ombudsmen offices around the world and to apply that knowledge to the better working of the Office of the Ombudsman of Ontario.

I apoligize for the length of this letter but, needless to say, my setting the record straight has required me to reply in detail to the inaccuracies, misinterpretation of figures, omissions and implications in some of the recent media reports. If I can be of any further assistance, please do not hesitate to contact me.

Yours sincerely,

Donald R. Morand

DRM/mal
enclosure

SCHEDULE 3

An Act to amend

The Ombudsman Act, 1975

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Clause a of section 1 of The Ombudsman Act, 1975, being chapter 42, is amended by adding at the end thereof "and without limiting the generality of the foregoing, includes a governmental organization set out in the Schedule."

2. Subsection 1 of section 6 of the said Act is repealed and the following substituted therefor:

   (1) The Ombudsman shall be paid a salary in an amount at least equal to the salary that may be paid from time to time to a Supreme Court Judge.

3. Section 9 of the said Act is amended by inserting after "equipment" in the second line ", services."

4. The said Act is amended by adding thereto the following section:

   9a (1) When, because the Legislature is adjourned, progrogued or dissolved or because the urgency of other public business prevents the Legislature from considering estimates or supplementary estimates, monies are urgently required for the purposes of this Act before they have been appropriated, the Treasurer of Ontario may, subject to the approval of the Lieutenant Governor in Council, advance the required monies for the use of the Ombudsman upon the written request of the Board of Internal Economy.

   (2) All monies advanced by the Treasurer of Ontario under subsection 1 shall be deemed to be an interest free loan repayable from monies to be appropriated by the Legislature for the purposes of this Act.

5. Section 12 of the said Act is repealed and the following substituted therefor:

12.-(1) The Ombudsman shall report annually upon the affairs of his office to the Speaker of the Assembly who shall cause the report to be laid before the Assembly if it is in session or, if not, at the next ensuing session.

(2) The Ombudsman, where he considers it to be in the public interest or in the interest of any person or governmental organization, may make a special report to the Assembly or comment publicly respecting any matter relating generally to the exercise of his duties under this Act, or to a particular complaint investigated or under investigation by him.

6. Section 13 of the said Act is repealed and the following substituted therefor:

13.-(1) Before commencing the duties of his office, the Ombudsman shall take an oath, to be administered by the Speaker of the Assembly, that he will faithfully and impartially exercise the functions of his office and that he will not, subject to this Act, disclose any information received by him as Ombudsman.

(2) Before commencing his duties, every officer or employee of the Ombudsman shall take an oath, to be administered by the Ombudsman, that he will not, subject to this Act, disclose any information received by him as an officer or employee of the Ombudsman.

(3) The Ombudsman and his officers and employees shall, subject to this Act, maintain confidentiality in respect of all information that comes to their knowledge in the performance of their duties under this Act.

(4) The Ombudsman may disclose or authorize any of his officers or employees to disclose any information that is necessary to,

(a) further an investigation;

(b) prosecute an offence under this Act; or

(c) establish grounds for his conclusions and recommendations made in a report under this Act.

(5) The failure of an officer or employee of the Ombudsman to adhere to the oath required by subsection 2 of this section, or to maintain confidentiality as required by subsection 3 of this section, may be considered cause for dismissal.

7. Clause b of section 14 of the said Act is amended by inserting after "to" in the first line "decisions,".

8. Clause a of subsection 4 of section 15 of the said Act is amended by adding at the end of the clause ", unless to require that the right be exercised or the time to expire would, in the Ombudsman's opinion be unreasonable, having regard to all the circumstances."

9. Subsection 5 of section 15 of the said Act is repealed and the following substituted therefor:

15.(5) If any question arises

(a) whether the Ombudsman has jurisdiction to investigate any case or class of cases under this Act; or

(b) in connection with the exercise by the Ombudsman of any of his powers or duties under this Act,

he may, if he thinks fit, apply to the Supreme Court for a declaratory order determining the question.

10. Subsection 2 of section 17 of the said Act is repealed and the following substituted therefor:

(2) Notwithstanding any provision in any Act, where a communication written by or on behalf of a person confined in a provincial correctional institution or training school, or a patient in a provincial psychiatric facility is addressed to the Ombudsman, it shall be immediately forwarded, unopened, to the Ombudsman by the person in charge of the institution, training school or facility; and a communication from the Ombudsman to such a person shall be forwarded to that person in a like manner.

11. Section 18 of the said Act is repealed and the following substituted therefor:

18.-(1) Without limiting the generality of the powers conferred on the Ombudsman by this Act, if before or during the investigation of any complaint within his jurisdiction, it appears to the Ombudsman that,

(a) under the law or existing administrative practice there is an adequate remedy for the complainant, whether or not he has availed himself of it;

(b) the complaint relates to a decision, recommendation, act or omission of which the complainant has had knowledge for more than twelve months before the complaint is received by the Ombudsman;

(c) the subject-matter of the complaint is trivial;

(d) the complaint is frivolous or vexatious or is not made in good faith;

(e) the complainant has not a sufficient personal interest in the subject-matter of the complaint; or

(f) having regard to all the circumstances of the case, any investigation or further investigation is unnecessary,

he may in his discretion refuse to investigate or further investigate the matter.

(2) In any case where the Ombudsman decides not to investigate or further investigate a complaint he shall inform the complainant in writing of that decision, and may if he thinks fit state his reasons therefor.

12. Section 19 of the said Act is repealed and the following substituted therefor:

19.-(1) Before investigating any matter, the Ombudsman shall inform the head of the governmental organization affected of his intention to make the investigation.

(2) Every investigation by the Ombudsman under this Act shall be conducted in private, unless the Ombudsman considers that there are special circumstances in which public knowledge is essential in order to further the investigation.

(3) Subject to subsection 4, the Ombudsman may hear or obtain information from such persons as he thinks fit, and may make such inquiries as he thinks fit in such manner as he considers appropriate, and it is not necessary for the Ombudsman to hold any hearing and no person is entitled as of right to be heard by the Ombudsman.

(4) If at any time during the course of an investigation, it appears to the Ombudsman that there may be sufficient grounds for his making any report or recommendation that may adversely affect any governmental organization or person, he shall inform the governmental organization or person of the grounds and possible conclusions and recommendations, and shall give the governmental organization or person an opportunity to make representations, either personally or by counsel, before reporting the result of the investigation.

(5) The Ombudsman may in his discretion, at any time before, during or after any investigation, consult with any person concerned in the matter of the complaint or investigation to attempt to assist in the resolution of a complaint.

(6) On the request of any minister in relation to any investigation, or in any case where any investigation relates to any recommendation made to a minister, the Ombudsman shall consult that minister after making the investigation and before forming a final opinion on any of the matters referred to in subsection 1 or 2 of section 22.

(7) Notwithstanding section 13, if, during or after an investigation, the Ombudsman is of the opinion that there is evidence of a breach of duty or of misconduct on the part of any officer or employee of any governmental organization, he may refer the matter to the appropriate authority.

13. Subsection 1 of section 20 of the said Act is amended by striking out "or under the" in the eighth line and inserting in lieu thereof ", custody or."

14. Section 20 of the said Act is amended by adding thereto the following subsections:

(2a) The Ombudsman may require any person summoned under subsection 2 to produce any document or thing which in the Ombudsman's opinion relates to any matter described in subsection 1, and which may be in the possession, custody or control of that person.

(2b) If any person,

(a) on being duly summoned before the Ombudsman makes default in attending;

(b) being in attendance refuses to take an oath legally required by the Ombudsman to be taken, or to produce any document or thing in his possession, custody or control legally required by the Ombudsman to be produced by him, or to answer any question to which the Ombudsman may legally require an answer;

(c) does any other thing that would, if the Ombudsman had been a court of law having power to commit for contempt, have been in contempt of that court,

the Ombudsman may certify the offence of that person under his hand to the High Court, and the court may thereupon inquire into the alleged offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defense, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

15. Section 22 of the said Act is repealed and the following substituted therefor:

22.-(1) This section applies in every case where, after making an investigation under this Act, the Ombudsman is of the opinion that,

(a) the decision, recommendation, act or omission which was the subject-matter of the investigation,

(i) appears to have been contrary to law;

(ii) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory;

(iii) was based wholly or partly on a mistake of law or fact; or

(iv) was wrong;

(b) in the making of the decision or recommendation, or in the doing or omission of the act a discretionary power has been exercised,

(i) for an improper purpose; or

(ii) on the taking into account of irrelevant considerations;

(c) in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

(2) If in any case to which this section applies the Ombudsman is of the opinion,

(a) that the matter should be referred to the appropriate authority for further consideration;

(b) that the omission should be rectified;

(c) that the decision or recommendation should be cancelled or varied;

(d) that any practice on which the decision, recommendation, act or omission was based should be altered;

(e) that any law on which the decision, recommendation, act or omission was based should be reconsidered;

(f) that the reasons should be given for the decision or recommendation; or

(g) that any other steps should be taken,

the Ombudsman shall report his opinion, and his reasons therefor, to the appropriate governmental organization, and may make such recommendations as he thinks fit and he may request the governmental organization to notify him, within a specified time, of the steps, if any, that it proposes to take to give effect to his recommendations and the Ombudsman shall also send a copy of his report and recommendations to the minister concerned.

(3) If within a reasonable time after the report is made no action is taken which seems to the Ombudsman to be adequate and appropriate, the Ombudsman, in his discretion, after considering the comments, if any, made by or on behalf of any governmental organization affected, may send a copy of the report and recommendations to the Premier, and may thereafter make such report to the Assembly on the matter as he thinks fit.

(4) The Ombudsman shall attach to every report sent or made under subsection 3 a copy of any comments made by or on behalf of the governmental organization affected.

16. Subsection 2 of section 23 of the said Act is amended by inserting after "complainant" in the second line ", the appropriate governmental organization and any person given an opportunity to make representations pursuant to subsection 4 of section 19."

17. Subsection 2 of section 25 of the said Act is amended by inserting after "exercise" in the fourth line "or intended exercise."

18. The said Act is amended by adding thereto the following section:

29a. The Lieutenant Governor in Council may by order add governmental organizations to the Schedule.

19. This Act comes into force on the day it receives Royal Assent.

20. The short title of this Act is The Ombudsman Amendment Act, 1981.

S C H E D U L E

Governmental Organizations

(to be settled)

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Section	Subject
PERMANENT DISABILITY	TEMPORARY SUPPLEMENTARY AWARDS

REFERENCES: Section 42(5) of the Act.
Board Policies and Administrative Directives, Claims Services Division - Pages 79 to 81.

POLICY: A temporary supplement may be granted to an injured employee in receipt of a permanent disability award, provided the following conditions exist:

1. The impairment of earning capacity of the employee is significantly greater than is usual for the nature and degree of his injury.

2. The injured employee must co-operate in and be available for a medical or vocational rehabilitation programme which would in the opinion of the Board aid in getting him back to work, or accept or be available for employment which is available and which in the opinion of the Board is suitable for his capabilities.

3. The injured employee is incapable for a foreseeable time of following his regular occupation with earnings comparable to his pre-accident income.

4. The injured employee is incapable of following other employment suitable to his condition which would provide income comparable to pre-accident income.

5. The incapacity suffered by the injured employee is due in whole or in part to the compensable disability.

GENERAL INFORMATION:

1. It is the responsibility of the Pensions Adjudicator to determine entitlement to a temporary supplement.

2. Such awards are paid monthly, in addition to the clinical pension award.

3. A supplement is usually granted for 3, 6, 9 or 12 months depending on the injured employee's employment status.

4. Supplements can be reviewed at any time and if the injured employee's circumstances change for the better or he fails to co-operate, the supplement may be cancelled immediately. The Pensions Adjudicator will advise the employee in writing of the decision.

5. Expiring temporary supplementary awards are reviewed by the Pension Adjudicator, one month prior to expiry date and on expiry date. Transcripts from the ENCOPS System are produced to refer the file to Desk 1449 for action.

6. Pension Adjudicators take the following factors into account when considering a supplement:

   a) Age
   b) Pre-accident occupation
   c) Years of service
   d) Education
   e) Locality
   f) "Other Income", Considered to be: Unemployment Insurance Benefits, Supplementary Unemployment Benefits, Canada Disability Pension Benefits, Early Retirement Pension, Long Term Disability Pension, Socio-Economic Factors etc.
   g) The employee's availability for work.

NOTE: The application for a pension under CPP (Canada Pension Plan) by an injured employee will not adversely affect consideration for payment of a supplement under Section 42(5), providing the employee signifies to the Board's Rehabilitation Counsellor that he is available for employment and will co-operate with the Vocational Rehabilitation Division.

7. The following additional circumstances may warrant cancellation of the supplement:

   a) Restoration of compensation benefits in the claim.
   b) The employee suffers a further accident and files a subsequent claim.
   c) The employee changes jobs.
   d) The employee moves out of the Province.
   e) The employee returns to work or fails to co-operate in a Medical or Vocational Rehabilitation Programme.

f) Retires from the labour market.

NOTE: Benefits under Section 42(5) do not usually apply if the employee receives a lump sum award for psychiatric disability.

CIRCUMSTANCES WHERE A SUPPLEMENT MAY BE PAYABLE

1. The injured employee may be entitled to a temporary supplement if,

   a) at the time of pension review, the employee's combined income from earnings and monthly pension is less than his pre-accident earnings,

   OR

   b) where the minimum permanent disability basis was used to calculate the monthly pension, if his income is less than the minimum permanent disability basis.

2. An injured employee over 65 years of age, may be entitled to a supplement, if it is established that he would have continued at work past age 65 or after retirement would have sought work.

3. Employees approaching 65 years of age, who will not likely ever obtain suitable employment due to various socio-economic factors may be granted a supplement for an appropriate period of time, usually up to age 65.

4. The Pensions Adjudicator is responsible for determining entitlement to the continuation of a Section 42(5) supplement, in cases where the employee requests or takes a vacation. The same criteria as is used for Section 41(1)(b) cases is utilized. (See PAYMENTS: VACATION WHILE DISABILED, Document Number 33 19 18).

5. A supplement may be considered for employees living outside Ontario, in Canada, only if adequate Vocational Rehabilitation Services are available.

6. An injured employee who is self-employed at the time of the accident or becomes self-employed after the onset of disability, may be entitled to a supplement for a limited period of time.

7. If a pension under C.P.P. is granted, then a supplement is usually not payable as the injured employee has declared himself to be incapable of seeking gainful employment. However, a supplement may be paid, if the employee makes himself available for employment and co-operates with the Vocational Rehabilitation Division. If a supplement is paid, regard is had to any income from the Canada Pension Plan.

PROCEDURE:

1. The Claims Adjudicator should refer all requests for a temporary/special supplement to the Pensions Section.

2. If a temporary supplement is granted, the Pension Adjudicator should flag the Warning Section of the claim jacket.

3. The Claims Adjudicator should inform the Pensions Adjudicator of any changes in employee's circumstances. See General Information, point #7, above.

4. Even if a supplement has been cancelled, the Claims Adjudicator should watch to see that those circumstances are not later altered, thus making the employee eligible again to receive a supplement.

5. As soon as the computer generated transcript is received in the claim, the Claims Adjudicator should refer the file to the Pensions Section, Desk 1449.

6. a) An injured employee who receives temporary total benefits, less monthly pension, as a result of a recurring disability, must be considered for a temporary supplement when benefits are closed, if he is still unemployed.

b) The Claims Adjudicator closes temporary benefits, reverts payment to the monthly pension only and then refers the claim to the Pensions Adjudicator to consider entitlement to a supplement under Section 42(5). The Pensions Adjudicator will advise the injured employee of the decision, in writing.

SECTION 42-(5)

Directive 1.

Temporary Supplementary Awards

Pre-Requisites

(1) The impairment of earning capacity of the employee is significantly greater than is usual for the nature and degree of his injury.

(2) The injured employee must co-operate in and be available for a medical or vocational rehabilitation programme which would in the opinion of the Board aid in getting him back to work, or accept or be available for employment which is available and which in the opinion of the Board is suitable for his capabilities.

(3) The injured employee is incapable for a foreseeable time of following his regular occupation with earnings comparable to pre-accident income.

(4) The injured employee is incapable of following other employment suitable to his condition which would provide income comparable to pre-accident income.

(5) The incapacity suffered by the injured employee is due in whole or in part to the compensable disability.

General

SUBJECT TO THESE PRE-REQUISITES, THE PENSIONS ADJUDICATOR SHALL CONSIDER THE FOLLOWING POINTS IN MAKING HIS DECISION:

(1) He should ensure the case has been referred to the Vocational Rehabilitation Branch to consider rehabilitation.

(2) After the clinical and temporary supplement awards have been made, the Pensions Adjudicator will send a memo to the Vocational Rehabilitation Branch outlining the amounts the employee will be receiving and asking that assistance be continued in those cases currently active in Vocational Rehabilitation Services.

(3) The temporary supplementary award will be reviewed at the end of three months by requesting a report from the Rehabilitation Counsellor and, if necessary, asking that assistance be accelerated.

SECTION 42-(5)

(4) At the end of the six-month period, the supplement will be discontinued or reduced unless circumstances indicate that continuation of the supplement will assist in successful rehabilitation.

(5) In cases of employees who will not likely ever obtain suitable employment, regard will be had for income from other sources such as C.P.P., etc. and where this income plus the clinical award equals or exceeds T.T., no temporary supplement will be paid. If total income is less than T.T., a supplement can be considered up to the equivalent of T.T. for an appropriate period of time up to three years and then review to determine if continuation of the supplement is warranted,

(6) Since a temporary supplementary award relates to earnings, it should not continue beyond normal working life. The Pensions Adjudicator should consider carefully the case of the employee over 65 years of age, and may decide in his favour if it is established that he would likely have continued at work past age 65, or sought other work after retirement from his normal occupation.

(7) Where an injured employee is not entitled to a supplement at time of rating, then any extension of T.T. which he is receiving at that time will continue for one month and the clinical award will then be implemented. The injured employee will be informed of this at the time of the Pensions interview.

(8) If an injured employee is currently in receipt of a pension and is laid off due to lack of work and requests rehabilitation assistance, he is generally not eligible for a temporary supplement as he usually receives other assistance such as U.I.C. benefits. Regard may be had for income from any other source.

(9) A supplementary award may be considered for employees living outside Ontario, providing approved Vocational Rehabilitation services can be provided or his residence outside Ontario does not prejudice his socio-economic situation.

(10) The Pensions Adjudicator may consider a supplementary award for persons self-employed at the time of the accident. He may also consider a supplementary award for former employees, self-employed after acquiring the disability. The latter requires very careful scrutiny.

SECTION 42-(5)

(11) Unscheduled review of a temporary supplementary award is in order wherever warranted by the particular circumstances of the case.

(12) Any unusual cases which do not meet the general criteria will be dealt with equitably and fairly having regard to the provisions of Section 42(5).

(13) When a temporary supplementary award is made the employee is to be informed by letter of the amount of the award, the period for which the award is payable and the date of future review. This advice will also instruct the employee to continue co-operating with the Vocational Rehabilitation Branch and to inform the Board immediately when he returns to work. In cases where the employee is working with a wage loss he will be asked to notify the Board of any wage increase he receives.

January 13/76
4500-#7

Directive 2. (1) The present policy of comparing an injured person's current earnings with his earnings prior to the accident in determining a wage loss, when considering a supplement under Section 42(5) be continued.

(2) Section 42(5) be appropriately amended to include a reference to pre-accident earnings in determining a wage loss to reinforce the meaning of the Section. The exact wording is to be developed.

October 19/76
4578-#6 Bd.M.

Directive 3. Application of Revalorization Under Section 42(8), (8a), and (8b) to Supplementary Awards Made Under Section 42(5)

(1) The escalation clauses be applied to supplementary awards made under Section 42(5) in current and future claims, and

(2) Claims in which the escalation clauses were not applied to the supplements be adjusted from a review of the records where available, or on request.

October 19/76
4578-#5 Bd.M.

SECTION 42-(5)

Directive 4. Canada Pension Plan Benefits

The Act is quite specific in that the injured employee must be available for employment or available for a medical or vocational rehabilitation programme to qualify for a supplement under Section 42(5) in addition to a permanent disability award.

The application for a pension under C.P.P. by an injured employee will not adversely affect consideration for payment of a supplement under Section 42(5) providing the employee signifies to the Board's Rehabilitation Counsellor that he is available for employment and will co-operate with the Vocational Rehabilitation Division.

If a pension is granted under C.P.P. the employee is then considered to be "not available for employment" since such pension is awarded on the basis that the applicant is incapable of following any gainful occupation. At this point, benefits under Section 42(5) will be adversely affected.

Benefits cannot be granted under Section 42(5) if the injured employee advises the Rehabilitation Counsellor that he is in effect not available for employment. The fact that he may apply for C.P.P. benefits is merely coincidental and the decision is made on the availability of the employee for employment or a vocational rehabilitation programme as required by the Act.

After a period of time, the employee may recover to the point where he is again available for employment and approaches the Vocational Rehabilitation Division for assistance. If the Vocational Rehabilitation Division reinstates rehabilitation services the Rehabilitation Counsellor will refer the claim to the Claims Adjudication Branch for consideration of a supplement under Section 42(5) which will be granted if the usual requirements are met. The Rehabilitation Counsellor will advise the employee to inform the C.P.P. that he is now actively seeking employment and is receiving a supplement under Section 42(5). The change in practice concerning Section 42(5) applies to claims processed, reviewed, reconsidered or reopened on and after January 23rd, 1980.

C.A.D.
January 22nd, 1980

January 25th, 1980.

SCHEDULE 6

SUMMARY OF RECOMMENDATION

1. FOR THE REASONS AS SET ON PAGES 1 AND 2 OF THIS REPORT THE COMMITTEE RECOMMENDS THAT ALL REPORTS TABLED BY IT IN THE LEGISLATURE WHICH CONTAIN RECOMMENDATIONS FOR THE ADOPTION OF OMBUDSMAN RECOMMENDATIONS BE DEBATED WITHIN EIGHT SESSIONAL WEEKS. (Page 8)

2. ACCORDINGLY IT RECOMMENDS THAT THE REMAINING NINE CASES BE COMPLETED AS QUICKLY AS POSSIBLE AND THAT THE OMBUDSMAN REPORT TO THE LEGISLATURE ON THE DISPOSITION OF EACH. (Page 16)

3. THE COMMITTEE RECOMMENDS THAT IN THE EVENT THAT THE OMBUDSMAN IS ABLE TO REACH A SATISFACTORY RESOLUTION OF ALL OUTSTANDING NORTH PICKERING MATTERS, OR IF HE CONCLUDES THAT THE RESPONSES OF THE MINISTER TO ANY OF HIS RECOMMENDATIONS ARE NEITHER ADEQUATE OR APPROPRIATE, THEN HE SHOULD REPORT TO THE LEGISLATURE ON THE THE NORTH PICKERING MATTERS BEFORE THE END OF JUNE, 1983. (Page 17)

4. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE ATTORNEY GENERAL TABLE, DURING THE 32ND PARLIAMENT OF THIS LEGISLATURE A BILL AMENDING OR OTHERWISE DEALING WITH THE OMBUDSMAN ACT HAVING REGARD FOR THE MATTERS CONTAINED IN THE DRAFT BILL AND POLICY SUBMISSION PROVIDED BY THE OMBUDSMAN IN JANUARY, 1981. (Page 18)

5. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE WORKERS' COMPENSATION BOARD RECONVENE A HEARING ON THIS MATTER AND CONSIDER THE EVIDENCE OF THE COMPLAINANT'S FAMILY PHYSICIAN AND THE PSYCHIATRIST RETAINED BY THE OMBUDSMAN FIRST HAND AND THEREAFTER DECIDE WHETHER THE POLICY OF BENEFIT OF THE DOUBT SHOULD BE APPLIED. (Page 28)

6. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE LIQUOR CONTROL BOARD OF ONTARIO UNDERTAKE SUCH A STUDY AND REVIEW AND REPORT TO IT AS SOON AS POSSIBLE ON THE NEED FOR SUCH AN OUTLET. IN

UNDERTAKING THIS INVESTIGATION THE BOARD SHOULD HAVE REGARD FOR THE CRITERIA DISCUSSED WITH THE COMMITTEE ON SEPTEMBER 8, 1982. (Page 31)

7. ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE MINISTRY OF HEALTH PAY THAT PORTION OF THE CLAIMS OF COMPLAINANTS CONTAINED IN CASE SUMMARIES 9 AND 10 WHICH WOULD HAVE BEEN AN INSURED BENEFIT HAD THE OPERATION BEEN PERFORMED BY AN PHYSICIAN. THE COMMITTEE FURTHER RECOMMENDS THAT SECTION 43 OF REGULATION 323/72 OF THE HEALTH INSURANCE ACT, 1972 BE AMENDED TO PERMIT THE GENERAL MANAGER TO DETERMINE THE AMOUNT OF PAYMENT FOR EXCEPTIONAL CASES WHERE MEDICAL PROCEDURES ARE PERFORMED BY PERSONS IN POSSESSION OF THE NECESSARY HOSPITAL PRIVILEGES WHO ARE NOT PHYSICIANS. THE COMMITTEE INTENDS THAT THESE RECOMMENDATIONS APPLY ONLY TO MEMBERS OF THE ROYAL COLLEGE OF DENTAL SURGEONS WHO HAVE OBTAINED THE NECESSARY HOSPITAL PRIVILEGES. (Page 34)

8. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE BOARD OF CHIROPRACTIC OF ONTARIO ALTER ITS PRACTICE OF INTERPRETING SECTION 25(2) OF REGULATION 228 BY REQUIRING APPLICANTS FOR THE ONTARIO CHIROPRACTIC LICENSING EXAMINATION TO HAVE TAKEN A COURSE OF STUDY CONTAINING FOUR ACADEMIC SESSIONS OF NINE MONTHS SEPARATED BY THREE MONTH VACATIONS. THE COMMITTEE FURTHER RECOMMENDS THAT THE BOARD OF CHIROPRACTIC OF ONTARIO ACKNOWLEDGE THAT THE COMPLAINANT HAS SATISFIED THE REQUIREMENTS OF THE REGULATION IN THIS REGARD AND IS THEREFORE ELIGIBLE TO WRITE THE ONTARIO CHIROPRACTIC LICENSING EXAMINATION. (Page 36)

9. THE COMMITTEE RECOMMENDS THAT THE APPEAL BOARD PANEL OF THE WORKERS' COMPENSATION BOARD IMMEDIATELY REVIEW ITS

DECISION OF MARCH 12, 1979 TO DETERMINE THE REASONABLE AND ACTUAL COSTS OF PROVIDING SUPERVISION AND ASSISTANCE WHICH THE CONDITION OF THE COMPLAINANT REQUIRES AND IF NECESSARY INCREASE THE AMOUNT OF THE ATTENDANCE ALLOWANCE. (Page 40)

10. THE COMMITTEE FURTHER RECOMMENDS THAT THE WORKERS' COMPENSATION BOARD REVIEW, BY JUNE 30, 1983, ITS POLICY CONCERNING ATTENDANCE ALLOWANCES TO TAKE INTO CONSIDERATION THE REASONABLE COST OF PROVIDING SUPERVISION FOR THOSE INJURED WORKERS WHO, AS A RESULT OF ACCIDENT, REQUIRE SOMEONE TO BE IN ATTENDANCE, IN ORDER TO PROVIDE THAT SUPERVISION. (Page 40)

11. ACCORDINGLY, THE COMMITTEE RECOMMENDS THAT THE APPEAL BOARD PANEL CANCEL ITS DECISION OF JULY 4, 1979, GRANT THE COMPLAINANT A NEW HEARING AND RECONSIDER HIS ENTITLEMENT IN THIS CLAIM EXERCISING THE DISCRETION GIVEN IT UNDER SECTION 43 OF THE WORKERS' COMPENSATION ACT. (Page 43)

12. ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE APPEAL BOARD PANEL OF THE WORKERS' COMPENSATION BOARD REVOKE ITS DECISIONS OF OCTOBER 3, 1978 AND GRANT THE COMPLAINANT THE FULL ASSESSED VALUE OF HIS PERMANENT PARTIAL DISABILITY PENSION RECOGNIZING THE NON-ORGANIC COMPONENT OF HIS DISABILITY UP TO THE DATE THE COMPLAINANT LEFT CANADA PERMANENTLY. (Page 45)

13. THE COMMITTEE FURTHER RECOMMENDS THAT THE WORKERS' COMPENSATION BOARD ASSESS AND DECIDE WHETHER THE COMPLAINANT SHOULD HAVE CONTINUING ENTITLEMENT TO THE INCREASED AMOUNT OF THE PENSION AFTER THE DATE HE LEFT CANADA PERMANENTLY. (Page 45-46)

14. ACCORDINGLY THE COMMITTEE RECOMMENDS THAT THE WORKERS' COMPENSATION BOARD RECONSIDER ITS DECISION OF JULY 24, 1980 AND ITS DECISION OF NOVEMBER 9, 1981 WITH A VIEW TO GRANTING THE COMPLAINANT A TEMPORARY SUPPLEMENT TO HIS PERMANENT PARTIAL DISABILITY AWARD, ON THE BASIS OF A FULL CONSIDERATION OF ALL RELEVANT EVIDENCE AND FACTORS. (Page 51)